

EXHIBIT 89

EXHIBIT D

1 (EXPEDITED COPY)

2 Continuing Bench Trial
3 (Day 5)

4 December 6, 2006
5 9:30 AM
6 40 Gleneida Avenue
7 Putnam County Office
8 Building
9 Carmel, New York

10 BEFORE: HON. ANDREW P. O'ROURKE
11 Presiding Supreme Court Justice

12 SUPREME COURT OF THE STATE OF NEW YORK
13 COUNTY OF ROCKLAND

14 _____ X

15 ANNE BRYANT
16 Plaintiff

17 - versus - Index No.
18 5192/00

19 BROADCAST MUSIC, INC., (a/k/a "BMI"),
20 FORD KINDER, KINDER & CO., LTD., VADIVOX, INC.,
21 JULES M. "JOE" BACAL; GRIFFIN BACAL, INC.,
22 STARWILD MUSIC BMI, WILDSTAR MUSIC ASCAP,
23 SUNBOW PRODUCTIONS, INC.,
24 Defendants

25 _____ X

26 ANNE BRYANT
27 Plaintiff

28 - versus - Index No.
29 2821/02

30 SUNBOW PRODUCTIONS, INC.,
31 Defendant

32 _____
33 Laurie Hardisty, RMR
34 Official Court Reporter
35 44 Gleneida Avenue, Carmel, NY 10512
(845) 225-3641 Ext. 294

1 APPEARANCES: PATRICK J. MONAGHAN, JR., ESQ.,
2 and MICHAEL KORIK, ESQ., Co-counsel
3 Monaghan, Monaghan, Lamb &
4 Marchisio, Esqs.
5 Attorneys for Plaintiff
6
7
8 GLORIA C. PHARES, ESQ.,
9 and JOHN C. KNAPP, ESQ., Co-counsel
10 Patterson, Belknap, Webb & Tyler, Esqs.
11 Attorneys for Defendant Sunbow
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25 JUDITH SAFFER, ESQ.,
and JOHN COLETTA, ESQ.,
Co-counsel BMI Legal Department

1 THE COURT: We're prepared to go forward,
2 Counselor?

3 MR. MONAGHAN: Yes, I am, Your Honor.

4 THE COURT: All right. Call your witness.

5 MR. MONAGHAN: All right. The Plaintiff
6 calls David Berman.

7
8 (Whereupon the witness, David M. Berman,
9 took the witness stand.)

10
11 THE COURT: Left hand on the Bible. Raise
12 your right hand.

13 Do you solemnly swear that the evidence
14 you're about to give in the matter herein before this
15 court will be the truth, the whole truth, and nothing
16 but the truth, so help you God?

17 THE WITNESS: Yes.

18
19 DAVID M. BERMAN, having been duly sworn, was examined
20 and testified as follows:

21
22 THE COURT: Please be seated. State your
23 name and your business address and spell your last
24 name.

25 THE WITNESS: David Berman,

1 B-E-R-M-A-N, 5142 Calvin Avenue, Tarzana, California.

2 MS. PHARES: Your Honor, just for the record,
3 could we please have an explanation of what cause of
4 action we are proceeding on this morning?

5 THE COURT: I'm going to take the testimony.
6 As I said yesterday, I limited this witness to certain
7 things that I would take testimony from him on, and I
8 think that's what we're going on it.

9 Let's go ahead.

10 MS. PHARES: And, for the record, I object to
11 our proceeding with this witness until there has been
12 a decision on our motion to dismiss.

13 THE COURT: Overruled. Exception granted.

14 Go ahead.

15 MR. MONAGHAN: Thank you, Your Honor.

16 DIRECT EXAMINATION BY MR. MONAGHAN:

17 Q. Mr. Berman, you have given your full name and address
18 to the Court Reporter?

19 A. Yes.

20 Q. Okay. And what is your occupation, sir?

21 A. Essentially I'm retired, but I do do a fair amount of
22 expert witnessing in music-related matters.

23 Q. Okay. And are you also an attorney?

24 A. I'm currently an inactive member of the California
25 Bar.

1 MR. MONAGHAN: All right. I'm going to have
2 the Reporter mark this document as ...

3 MS. PHARES: Could you ask Mr. Monaghan to do
4 his examination from the podium so we can see the
5 witness?

6 THE COURT: I'm sure he will, I'm sure he
7 will as he can. But I think maybe his questions are
8 on that computer there.

9 MR. MONAGHAN: That's correct, Your Honor.
10 And I'm over here, and I think everybody can see from
11 here. That's why I moved to the left side of the
12 table.

13 THE COURT: Okay. But do try to speak up.
14 We don't have that noise we had yesterday, but make it
15 back.

16 Go ahead.

17

18 (PLAINTIFF'S EXHIBIT NO. 49 - CURRICULUM

19 VITAE OF DAVID M. BERMAN - FOR IDENTIFICATION.)

20

21 MR. MONAGHAN: I'm going to show the witness
22 a document which will be marked Plaintiff's 49 for ID
23 at this time.

24 Q. Mr. Berman, can you identify this document?

25 A. Yes, I can.

1 Q. What is it, sir?

2 A. It's my CV.

3 Q. I'm sorry. I didn't catch your answer.

4 A. It's my CV.

5 Q. Your CV, your resume?

6 A. Yes.

7 THE COURT: Any objection to that going into
8 evidence?

9 MS. PHARES: I don't have any objection to
10 this going into evidence, but I don't want that to be
11 considered a waiver of our position of whether or not
12 he's qualified.

13 THE COURT: Counselor, I'm not waiving
14 anything for you.

15 MR. PHARES: I'm just making the record, Your
16 Honor.

17 THE COURT: Now, it's been accepted into
18 evidence.

19

20 (PLAINTIFF'S EXHIBIT NO. 49 - CURRICULUM
21 VITAE OF DAVID M. BERMAN - RECEIVED IN
22 EVIDENCE.)

23

24 THE COURT: Go ahead.

25 Q. Now, sir, is this a current resume?

1 A. Actually, the only addition to the current one I use
2 is there's a paragraph at the end which just indicates
3 my activities as an expert witness in music-related
4 matters.

5 Q. Okay. And can you tell the Court, in your own words, a
6 brief resume of your educational background?

7 A. I went to University of Michigan, graduated with a
8 Bachelor's of Business Administration in 1966, and
9 then I received a J.D. from Harvard Law School in
10 1969.

11 Q. Okay. What did you do after you graduated Harvard Law
12 School?

13 A. I joined the law firm of Mitchell, Silberberg, and
14 Knupp, K-N-U-P-P.

15 Q. Okay. And when did you do that?

16 A. In 1969.

17 Q. Did you start as an associate?

18 A. I started as an associate in the Entertainment
19 Department, specifically the Music Division of the
20 Entertainment Department, specializing in music-
21 related matters.

22 Q. And we'll get to some of what you did there.

23 What did you do after you were at Mitchell,
24 Silberberg, and Knupp, after you left Mitchell,
25 Silberberg?

1 A. I left Mitchell. I went to Warner Brothers Records in
2 April of 1976 as the Vice President and later Senior
3 Vice President of Business Affairs.

4 Q. Okay. Coming back to your -- so, now we've got your
5 career from '69 through '87?

6 A. That's correct, beginning of '87, yes.

7 Q. Okay. When you were at Mitchell, Silberberg, what
8 involvement did you have with the music industry in
9 general and specifically with music publishing?

10 A. At Mitchell we represented -- we represented a wide
11 variety of songwriters, music publishers, Hoyt Axton,
12 -- he wrote Joy to the World -- Buffy Saint Marie, The
13 Doors, The Beach Boys. We represented a number of
14 publishing companies, relative -- fairly large ones,
15 such as Almo/Irving, the publishing affiliate of A&M
16 Records, Island Music, the publishing affiliate of
17 Island Records.

18 We also represented a number of smaller
19 publishing companies. Hoyt Axton's company, Buffy
20 Saint Marie's company, Perry -- Richard Perry, a well-
21 known producer, his company. They all -- they all
22 acquired copyrights in various ways, either as writers
23 or, in the case of producers, often acquiring
24 copyrights of artists they would produce. And we
25 would, in fact, administer those smaller publishing

1 companies. So, we actually administered the
2 publishing for Hoyt and Buffy Saint Marie, and Richard
3 Perry, and many others like that.

4 Q. This is while you were at Mitchell Silberberg?

5 A. This was all while I was at Mitchell Silberberg.

6 In addition, at Mitchell, we were involved
7 with the licensing of copyrights for soundtrack albums
8 and for theatrical motion pictures.

9 Q. Okay. Now, you went to Warner Brothers, according to
10 your Exhibit 49, your resume, in 1976; is that right?

11 A. That's correct.

12 Q. And you were Vice President, Senior Vice President of
13 Business Affairs?

14 A. That's correct.

15 Q. Tell the Court, please, what that involved, generally.

16 A. Well, on the music publishing side, it involved again,
17 obviously, acquiring mechanical licenses for all of
18 the recordings that we made. We also had somewhat of
19 a joint venture arrangement with Warner Music, the
20 publishing arm the Warner Music group, whereby if we
21 signed an artist to a recording contract, I would
22 contact, at the time, a gentleman by the name of Chuck
23 Kay, who was running Warner Music, and he would
24 attempt to get the publishing on that artist. It was
25 a bit of synergy. And if he was able to do so, and we

1 would cooperate, then we would share in the publishing
2 income derived from that artist. So, we were also in
3 the publishing business in that sense.

4 Q. So, you've had --

5 A. Excuse me. Plus, we also did a large number of
6 soundtrack albums and was involved in licensing music
7 rights for the -- the theatrical motion pictures and
8 the soundtrack albums therefrom.

9 Q. And did there come a time when you left Warner
10 Brothers?

11 A. Yes. In February of '87, I went to Capital --
12 actually, I started as the President of Capital
13 Industries, Inc., which was a North American holding
14 company authority of EMI, and in that capacity, I was
15 responsible for international, Canada, human resources
16 legal, finance, etcetera, as well as, I had
17 responsibilities for Screen Gems Music, which was the
18 publishing affiliate of, at the time it was Thorne
19 EMI.

20 Q. And when you were at Warner Brothers, what were some
21 of the artists that you dealt with in publishing
22 agreements that you dealt with?

23 A. I don't remember -- well, in terms of artists involved
24 with, Prince, Rod Stewart, George Benson, Fleetwood
25 Mac --

1 Q. How about Madonna?

2 A. Madonna.

3 Q. And how about some of the publishing companies, can
4 you recall the names of any of the publishing
5 companies that you were involved with at that time?
6 That's at Warner Brothers.

7 A. Well, the direct involvement with the publishing there
8 was with arrangement we had with Warner Brothers
9 Music.

10 Q. How about, does the name Chrysalis Records, Island
11 Records, Tommy Boy Records mean anything -- those
12 names mean anything to you?

13 A. Well, yes, they do, but they were all record deals,
14 not necessarily publishing agreements.

15 Q. Okay. Now, you mentioned EMI. What is that company,
16 please?

17 A. Well ... I'm sorry?

18 Q. I think you mentioned that you, when you were at
19 Capital, that was the North American subsidiary of
20 EMI.

21 MS. PHARES: We can't hear, we can't see, and
22 I know that Mr. Monaghan has apparently given up using
23 his screen.

24 MR. MONAGHAN: No, no, I haven't. It's a
25 combination.

1 MS. PHARES: Well, it's not turned on.

2 THE COURT: All right. Mr. Monaghan, I'm
3 going to ask you to keep your voice up. Perhaps you
4 could go a little this way, just to make sure that
5 you're heard.

6 MR. MONAGHAN: I'll hide behind the screen,
7 Judge. They'd probably like me to do that.

8 Q. All right. And for how long were you at Capital
9 Industries, sir?

10 A. For approximately six months I was the President of
11 Capital Industries, Inc., till -- from roughly
12 February through October. I then went and became the
13 President of Capital Records, the label itself.

14 Q. And you mentioned Screen Gems. What was Screen Gems?

15 A. Screen Gems was the publishing arm of EMI, a pretty
16 substantial publishing company. And Screen Gems
17 reported to me when I was President of Capital
18 Industries.

19 Q. Over the course of the period of time that you were
20 first an associate of Mitchell Silberberg and then
21 through the period of time you were at Capital,
22 approximately how many music publishing agreements
23 would you have had dealings with?

24 A. Oh, my good -- starting at Mitchell?

25 Q. Right.

1 A. Hundreds.

2 Q. Okay. And in what capacities? For example, were you
3 involved with drafting them, reviewing them, giving
4 opinions about them, any of those?

5 A. All of the above.

6 Q. And have you been hired --

7 THE COURT: He said "all of the above".

8 Go ahead.

9 Q. Okay. And were you retained by the Plaintiff in this
10 matter?

11 A. Yes.

12 Q. And are you being paid for your services?

13 A. Yes, I am.

14 Q. And have you testified before as an expert witness in
15 various matters?

16 A. Yes, I have.

17 Q. And approximately how many matters have you testified?

18 A. Oh, testimony, either via affidavit, expert report,
19 deposition, or trial testimony, in probably 20 cases.

20 Q. And, overall, how long is your experience in the music
21 business?

22 A. Well, since 1969.

23 Q. And have you also, after your Capital Industries
24 tenure, did you have occasion to take on another
25 position?

1 A. I left Capital, and for about a year, from roughly
2 1990 to early '91, I went back to Mitchell,
3 Silberberg. And then in '91, May, I think, of '91, I
4 became -- I went to Geffen Records, where I was -- we
5 didn't have titles per se. I think my contract
6 referred to me as a Senior Executive in charge of
7 business affairs and administration. And I
8 subsequently took on the title of General Counsel.

9 Q. Okay. And then did there come a time when you left
10 Geffen Records?

11 A. I left in February of '98 to become the President of
12 the Buena Vista Music Group, which is the recorded
13 music and music publishing arm of the Walt Disney
14 Company.

15 MR. MONAGHAN: We offer Mr. Berman, Your
16 Honor, as a Plaintiff's expert on the subject matters
17 that were discussed by the Court yesterday.

18 MS. PHARES: Voir dire, Your Honor?

19 THE COURT: Yes, certainly.

20 VOIR DIRE BY MS. PHARES:

21 Q. How are you, Mr. Berman. I'm Gloria Phares. I'm
22 counsel for the Defendant, Sunbow Productions, Inc.

23 A. Good Morning.

24 Q. You mentioned that when you were at Mitchell,
25 Silberberg, you said "we represented", and I take it

1 you mean the firm represented, a wide variety of
2 interests and so forth; is that correct?

3 A. The firm did. I believe that every writer, producer,
4 or publishing company that I mentioned I also worked
5 on.

6 Q. And when you say you worked on it, were you directly
7 drafting agreements with publishing agreements?

8 A. Yes.

9 Q. And could you say roughly what -- what number of them
10 you did while you were there?

11 A. I did practically all of the agreements for Almo/
12 Irving, which is a very large publishing affiliate of
13 A&M Records. It could have been hundreds in the seven
14 plus years I was there.

15 Q. Did they involve -- did any of these agreements
16 involve the commissioning of music for movies?

17 A. At times it did. We -- I was involved with the movie
18 Shaft. Isaac Hayes wrote the theme for Shaft. There
19 were others. I can't recall specifically right now.

20 Q. Was the commissioning of music for TV and movie a
21 large portion of your publishing work?

22 A. Not a large portion, no.

23 Q. What proportion would you say it was?

24 A. Of the publishing work?

25 Q. Yes.

1 A. 10%.

2 Q. And have you ever participated directly in the
3 auditing of a -- company songwriters, audits of their
4 royalty statements?

5 A. I have not performed an audit, but I've certainly
6 reviewed and been involved with audits.

7 Q. And how have you been involved?

8 A. As the attorney for the writer or the publisher, both
9 sides.

10 Q. How many times?

11 A. Oh, 10, 15.

12 Q. Are you familiar with music publishing royalty
13 statements?

14 A. Yes, I am.

15 Q. And have you had extensive experience reviewing them?

16 A. I certainly had a lot of experience reviewing them.

17 Q. Have you ever reviewed them in connection with an
18 audit?

19 A. Yes.

20 Q. And when you were at Warner Music, did you have direct
21 day-to-day responsibility for its publishing work?

22 A. No, I was not at Warner Music. I was at Warner
23 Brothers Records.

24 Q. Correct.

25 A. And I dealt with their music publishing affiliate,

1 Warner Music.

2 Q. But you did not have day-to-day work with their music
3 publishing when you were at Warner Music?

4 A. I believe I used "responsibility".

5 Q. At Warner Records.

6 A. At Warner Records I did not have responsibility for
7 Warner Music.

8 Q. Right. So, you were not doing day-to-day music
9 publishing work when you were at Warner Records?

10 A. I did -- I did get involved occasionally on publishing
11 issues. I didn't have day-to-day publishing
12 involvement.

13 Q. Did you get involved with the commissioning of music
14 for motion pictures while were you at Warner Records?

15 A. Yes.

16 Q. In what capacity?

17 A. In the case of Purple Rain, Prince's movie, which he
18 was a Warner Brothers artist, and we of course had the
19 soundtrack album and we were involved in the entire
20 creation of that film and the licensing of all the
21 rights; other soundtracks as well.

22 Q. But that wasn't commissioned music, was it?

23 A. All of the music in Purple Rain was written for the
24 film.

25 Q. And when you were at Capital Industries, you said you

1 had responsibilities for Screen Gems and they reported
2 to you. Did you have day-to-day responsibility for
3 the music publishing in that capacity?

4 A. Well, the head of ... It was one of the areas of my
5 responsibility. I didn't do the day-to-day publishing
6 work, but the entire operation of Screen Gems Music
7 reported to me.

8 Q. But you didn't have day-to-day responsibility for the
9 work or you weren't participating in their day-to-day
10 operations?

11 A. I was certainly involved in any dealings that they
12 would make, in any signings that they would enter
13 into. I had responsibility for the operation of the
14 publishing company.

15 Q. Well, I understand, I do understand your being
16 responsible. What I'm looking for is whether or not
17 you have the day-to-day experience with the
18 commissioning of music, with the licensing of it on a
19 day-to-day basis, as opposed to being ultimately
20 responsible for it?

21 A. I didn't personally license the music, nor did even
22 the head of Screen Gems. That went down substantial
23 layers.

24 Q. How much are you being paid?

25 A. \$500.00 an hour.

1 Q. And of your 20 cases, could you say generally how they
2 break down of whether or not you represent song-
3 writers or publishers?

4 A. My goodness.

5 Q. Or record companies, I suppose.

6 A. Right. It runs the gamut. Songwriters, artists,
7 record companies, Solomon Smith Barney I represented
8 in one case on a music matter. I'd say more of them
9 were in the record area than the publishing area, but
10 some of them certainly did deal with music.

11 Q. How many?

12 A. Maybe five.

13 Q. And when you were at Geffen, were you directly
14 involved with day-to-day publishing matters?

15 A. At Geffen, for the initial few years, there was also
16 an affiliated company, Geffen Music, a publishing
17 company, and I had responsibilities for Geffen Music.
18 We ultimately sold that to Universal but I continued
19 to be involved in publishing issues. We did a large
20 number of soundtrack albums, and -- and it became
21 prevalent by that time, when a label would acquire a
22 soundtrack album, that essentially what we were doing
23 was paying the music budget for entire film. And in
24 that sense, any music that was being commissioned
25 specifically for the film, the film company generally

1 insisted on ownership of at least half the copyright.
2 Since we were paying for that, I got intimately
3 involved in the negotiation and the contractual
4 negotiation of those licenses.

5 Q. With the songwriters?

6 A. With representatives of the songwriters, yes.

7 Q. And when you were at Buena Vista Music?

8 I mean, I understand that record companies
9 have publishing labels, so -- and I understand the
10 notion of your being ultimately responsible, but what
11 I'm looking for is how much experience you have on a
12 day-to-day level with the commissioning of music for
13 TV or motion pictures.

14 A. Well, you said at Buena Vista?

15 Q. Uh-huh.

16 A. At Buena Vista, again, I had responsibility for the
17 Walt Disney Publishing Company, a very large
18 publishing operation. In addition, we did do a number
19 every soundtrack albums on the record side with
20 Paramount, under the same terms that I just described,
21 where essentially we paid for the entire music budget.
22 Paramount insisted on anything that was written for
23 the movie that they own the copyright. So, I became
24 involved in negotiating those.

25 Finally, at the Disney Company, on the

1 animated side, the Walt Disney Company demands
2 complete and total ownership of a hundred percent of
3 the copyright on any composition that is written for
4 and included in their animated features. And while I
5 was there, we did Tarzan, and, you know ... I can't
6 remember all the features we did. So, yeah, I was
7 involved in those issues.

8 Q. Now, you mentioned throughout your answers references
9 to movies.

10 Have you ever done any music publishing work
11 in connection with the commissioning of work for
12 television?

13 A. Yes, but much less.

14 Q. When did you do it?

15 A. I know I did some at Mitchell Silberberg.

16 Q. You mean in the early in the 70s?

17 A. Yeah, I left in 78, yes.

18 Q. '78 or '76? Maybe I misread this.

19 A. I left Mitchell, Silberberg in '76; you're right.

20 Q. And any other occasion which you have done the
21 commissioning of music for television in the last 30
22 years?

23 A. Yes, yes, but I can't recall specifically right now.

24 Q. Is that because there's so little of it?

25 A. There wasn't that much television work.

1 MS. PHARES: Your Honor, I am going to oppose
2 the admission of the -- or acceptance of Mr. Berman as
3 an expert for the subjects with which he's being asked
4 to testify --

5 THE COURT: All right.

6 MS. PHARES: -- based on his qualifications.

7 THE COURT: I'm allowing his testimony, and
8 I'll put such weight on it as I feel is warranted.

9 Thank you, Counsel.

10 MR. MONAGHAN: Thank you, Your Honor.

11 So, the Court is accepting Mr. Berman as
12 an expert for the subject matters discussed?

13 THE COURT: Yes, yes.

14 MR. MONAGHAN: All right.

15 DIRECT EXAMINATION BY MR. BERMAN:

16 Q. Now, Mr. Berman, what is music publishing? What does
17 that mean?

18 MS. PHARES: Your Honor, could we please ask
19 Mr. Monaghan to use the podium? He's not -- he's
20 really working off his --

21 MR. MONAGHAN: Your Honor, that's a very tiny
22 podium and I have a lot of papers --

23 MS. PHARES: We can't see.

24 MR. MONAGHAN: -- and I don't think I'm
25 impeding anybody's view, or if I have to speak up, I

1 certainly will.

2 MS. PHARES: I can't see.

3 THE COURT: Well, if you'd move more that way
4 so that you can see whatever you need to get hold of
5 you there, in front of you, maybe that will solve the
6 problem.

7 Go ahead.

8 MR. MONAGHAN: Can everybody back there see?

9 THE COURT: Well, now you're looking at them.

10 MS. PHARES: At the moment.

11 THE COURT: Try looking this way and make
12 sure they understand.

13 MR. MONAGHAN: All right.

14 Q. Same question: What's music publishing to the
15 uninitiated?

16 A. Music publishing involves the exploitation of
17 copyrights into musical compositions.

18 Q. And for whose benefit is that done, that exploitation
19 you just mentioned?

20 A. Well, for the benefit of the publisher, the owner of
21 the copyright, and the writer of the composition, or
22 writers.

23 Q. And are you -- what is the extent of your familiarity
24 with the general customs and practices in the music
25 publishing business?

1 Are you saying you're an expert in that area
2 as well, specifically?

3 A. Yes, I am.

4 Q. Okay. Now, what does administration, which is a term
5 you've used, what does that mean, administration of
6 publishing?

7 A. The administrator of the publishing is the entity,
8 whether or not they own the copyright, that is the
9 entity that issues the licenses, be they mechanical
10 synchronization, enters into foreign publishing
11 agreements, etcetera, collects the income, and pays
12 out to the respective participants, be they
13 co-publishers or writers.

14 Q. Okay. So, the job of the administrator is to exploit
15 the copyright and then collect the monies and pay and
16 also account for those monies; is that not right?

17 A. That's correct.

18 Q. Okay. And what are some of the tasks involved in
19 doing that? From -- take the Court from start to
20 finish. Let's take it from the time that -- assume a
21 writer -- and you're allowed to make assumptions here
22 as an expert witness -- assume that a writer has
23 conveyed the copyright to a publishing company.

24 A. Okay.

25 Q. Take the Court through that whole process, please.

1 A. All right. The writer conveys the copyright to the
2 publishing company in question. The publishing
3 company then has the obligation to register the
4 copyright with the copyright office, also to register
5 the composition with the appropriate performing rights
6 society.

7 Q. Who would they be?

8 A. The prominent ones are ASCAP or BMI. There's also
9 SESAT (sic), a lesser -- a smaller company.

10 Q. If I can interrupt this. It's not a good idea for me
11 to interrupt you either.

12 And for whose benefit is that registration
13 with the performing rights society provide? For who
14 is that done?

15 A. That is done for both the publisher and the writer,
16 performing rights, law performing rights, the income
17 derived from that is collected by the performing
18 rights society, essentially BMI or ASCAP. They
19 collect them, and they pay directly to the publisher
20 the publisher's share of performing royalties and
21 directly to the writer or writers the writer's share.

22 Q. And what information is filed by the publisher with
23 the performing rights society? Are you familiar with
24 how that's done?

25 A. Yes.

1 Q. Please tell the Court.

2 MS. PHARES: Objection. Relevance?

3 THE COURT: I'll allow it.

4 Go ahead.

5 A. In the case of a basic composition, they will send a
6 copy of the composition with the appropriate
7 information of the writer -- the writers, etcetera.

8 In the case of music for television, written
9 for television, there's a cue sheet which is sent to
10 the performing rights society, and the cue sheet is a
11 notation of the music to be included in the
12 appropriate TV show. And the performing rights
13 society uses the cue sheet in a very complicated
14 manner that I can't explain to eventually calculate
15 how much performance income is going to be paid to the
16 publisher and writer for the music contained in the
17 appropriate television show.

18 Q. Okay. Now, we were talking about what's involved in
19 administering publishing. You've said filing the
20 copyright, registering with the performing rights
21 society.

22 What is about licensing?

23 A. The administrator will also issue or cause to be
24 issued various licenses, mechanical licenses, for the
25 reproduction of a record, CD, etcetera;

1 synchronization licenses, the licensing of the
2 composition for inclusion in a motion picture,
3 theatrical motion picture, or television or
4 commercial; print licenses, for the licensing of
5 sheet music, music folios, band arrangements,
6 etcetera.

7 Q. Now, you said mechanical licensing. Can you be a
8 little more -- can you elaborate a little bit on what
9 a mechanical license involves and what products or use
10 of the music come within your understanding as an
11 expert, with all that background that you've testified
12 to, regarding mechanical licenses?

13 A. In order to manufacture and distribute a phonograph
14 record, which embodies a musical composition, the
15 record company in question has to obtain what is
16 called a mechanical license, which gives them the
17 right to include that composition in that record. And
18 record includes not only CCS, DVD -- not only CDs,
19 vinyl, cassettes, etcetera, but also DVD, audiovisual
20 devices, etcetera.

21 Q. Audiovisual devices?

22 A. Yes.

23 Q. So, would I be correct that if one were to bring out a
24 DVD which had a video component, but also an audio
25 component, that would require some sort of mechanical

1 license from the -- either the administrator, the
2 publisher, or the composer?

3 A. Yes.

4 Q. And, typically, who keeps track? Is there some
5 organization that is generally used with respect to
6 the mechanical licensing?

7 A. There was an agency called the Harry Fox Agency, which
8 many publishers and small publishing companies use to
9 issue mechanical licenses, to collect mechanical
10 royalties, and then to distribute them accordingly.

11 Q. Now, you also used the term sync license, I believe,
12 or synchronization license.

13 A. Correct.

14 Q. Under what circumstances would a synchronization
15 license come into play with respect to the
16 administration of publishing?

17 A. A synchronization license is required to synchronize a
18 musical composition in timed relationship with moving
19 images. So, to include a composition in a theatrical
20 motion picture or a television show, the film company
21 or television production company, as the case may be,
22 is required to obtain a synchronization license, which
23 is issued by the publisher.

24 Q. Okay. Are there any other ways that income is
25 generated in connection, in your experience in the

1 business, from the use of a piece of music?

2 A. Well, there are -- the four predominant methods of
3 generating income from a musical composition are
4 performing rights; there's also a concept, grand
5 performing rights, which is for production of a live
6 theatrical presentation, a Broadway play would be
7 grand performing rights. So, you have performing
8 rights, mechanical royalties, synchronization
9 licenses, and print licenses, and those are the four
10 predominant areas of earning money off of a copyright.

11 Q. And BMI deals with small performing rights, as opposed
12 to grand performing rights; is that right?

13 A. That's correct.

14 Q. Okay. In connection with your retention by the -- in
15 this matter, what documents or materials were you
16 given?

17 A. Let me think. I reviewed an Amended Complaint in this
18 matter. I reviewed what I think is being referred to
19 as the Jem Agreement.

20 Q. Is that -- is that the document I'm showing you now,
21 Exhibit M in evidence (handing)?

22 A. Yes, yes.

23 Q. And did you review that agreement in detail?

24 A. Yes, I did.

25 Q. And you've had this agreement for a couple of years

1 now; correct?

2 A. I think it's been almost three years, I think.

3 Q. Anything else you reviewed?

4 A. I reviewed an expert report or affidavit -- I think
5 affidavit of a Helene Blue.

6 Q. How about any other agreements?

7 A. Yes. I reviewed some other songwriter's agreements of
8 Ms. Bryant, as well as I reviewed a number of foreign
9 licensing agreements.

10 Q. Licensing agreements by Sunbow?

11 A. Yes.

12 Q. Okay. Now, you reviewed these agreements in the
13 context and with the background of the experience
14 you've had in the music publishing and music business
15 generally; correct?

16 A. That's correct.

17 Q. Okay. Did you see anything different in the Jem
18 Agreement, in general, in terms of consents and income
19 sources than you've seen throughout your career in
20 music publishing agreements?

21 A. Not really, no.

22 Q. Did the Jem Agreement deal with those types of income
23 that you've described are generated by the use of a
24 musical composition?

25 A. Yes, it did.

1 Q. Okay. So, it dealt with all four areas of the
2 generation of income, did it not?

3 A. Yes, it did.

4 Q. Okay. And did it have a -- did it not have a
5 provision for payment of writers' royalties?

6 A. Yes, it did.

7 Q. And did you see anything in the agreement where there
8 was a waiver in the agreement of any rights to either
9 performance royalties or publishing royalties by the
10 writer?

11 A. There's no waiver. There are two exclusions. I
12 wouldn't call them a waiver.

13 The agreement does specify that the writer is
14 not entitled to synchronization license income from
15 the inclusion of the music in the television broad-
16 cast of the show. And, also, there -- it does not --
17 the writer is not entitled to mechanical royalties on
18 what I believe is referred to as promotional
19 cassettes. But, other than that, the writers'
20 royalties provided for in the agreement are the
21 standard and typical writers' royalties.

22 Q. Now, do you have the agreement in front of you?

23 A. No.

24 Q. Can you tell the Court, please, which paragraphs of
25 the agreement deal with which type of royalties?

1 A. Paragraph 5 deals with performing rights and makes it
2 clear that the writer is entitled to his or her share
3 of performance income, also makes clear that the
4 writer is not entitled to the publisher's share of
5 performance income.

6 Paragraph 6 covers all of the other sources
7 of income.

8 Q. Okay. Now, if I can direct your attention to
9 Paragraph 6, which begins on the bottom of Page 4;
10 okay?

11 Do you agree with me, and this is in
12 evidence, so we can actually read it into the record,
13 but we won't burden the Court with that. It's seen
14 this for a while now.

15 This deals with music publishing rights, does
16 it not, on the bottom of Page 4?

17 A. Yes, yes.

18 Q. Then it goes on to provide, does it not, that if the
19 Company -- and in this case the Company is Sunbow;
20 correct?

21 A. Yes.

22 Q. If the Company that exercises music publishing rights
23 in the music, but excluding the premium cassettes --
24 that's the exclusion you just talked about?

25 A. Correct.

1 Q. Okay -- for which the Contractor shall not receive any
2 further compensation, uses of the music, combined with
3 lyrics -- and then it goes on to say -- and then it
4 goes on to define what the writer is supposed to get.
5 Is that not correct?

6 A. That's correct.

7 Q. Okay. And what does Subparagraph 6(ai) deal with?

8 A. 6(ai) deals essentially with mechanical royalties and
9 synchronization licenses for theatrical motion
10 pictures.

11 Q. Now, are there synchronization licenses for other than
12 motion pictures?

13 A. Yes.

14 Q. Okay. And you might have touched upon this, but would
15 you please elaborate now and tell us where a
16 synchronization license might be obtained for a -- the
17 use of the music other than in a theatrical motion
18 picture?

19 A. A television show or a television commercial, certain
20 Karaoke videos, things like that.

21 Q. Okay. Now, and in your expert opinion, what is a --
22 what is the industry's customary interpretation of the
23 term phonograph records?

24 A. Essentially, any audio and/or audiovisual device
25 intended for home use.

1 Q. Okay. And was this a -- this audiovisual device
2 intended for home use that you talked about, when did
3 such devices actually start to come into use in the
4 United States?

5 A. I believe audio/video cassettes -- excuse me -- boy,
6 I'm showing my age. I'm going to say late '70s.

7 Q. Okay. This is Jem -- this is Exhibit 13 in evidence,
8 Jem. Is that the type of audio cassette -- audio/
9 video cassette we're talking about?

10 A. Yes.

11 Q. You play that in a video recorder?

12 A. Old-fashioned VCR.

13 Q. Okay. The technology -- we're dealing with a contract
14 here, what is it, 1986 contract. And is it your
15 testimony, under oath, that --

16 MS. PHARES: Objection, Your Honor. The
17 contract is an '85 contract. We keep going over and
18 over this.

19 MR. MONAGHAN: Okay. That's fine. I change
20 that.

21 THE COURT: All right. 1985.

22 MR. MONAGHAN: Thank you. It actually helps
23 the question.

24 Q. So, we're dealing with a 1985 contract that talks
25 about license of commercial phonograph records. Now,

1 this is a typical clause in 1985; isn't it?

2 A. Yes.

3 Q. Okay. Now, if this -- if this similar subject matter
4 were in a typical contract today, what would you have
5 expected the language dealing with that subject matter
6 to say?

7 MS. PHARES: Objection. Relevance.

8 THE COURT: Sustained.

9 Q. Okay. Now, so you've covered mechanical royalties.
10 So, Subparagraph 6(ai) would deal with mechanical
11 royalties?

12 A. Yes.

13 Q. Okay. And this Exhibit 13, would you please tell the
14 Court whether or not you would have expected that the
15 use of the music in this, which is a Sunbow
16 Production, would have required an accounting and
17 payment of mechanical royalties?

18 A. It would have required a payment of some form, be it
19 mechanical or synchronization, for the right to
20 include music in that device.

21 Q. Coming within Paragraph 6(ai)?

22 A. 6(ai) or 6(avi), a combination thereof.

23 Q. You're talking about the paragraph -- that
24 subparagraph that says with respect to Other Uses of
25 The Music?

1 A. That's correct.

2 Q. Okay. So, it's either going to be in "I" or in 6a --
3 6(avl)?

4 A. "vi", that's correct.

5 Q. Okay. And, likewise, what about licenses for DVD?

6 A. Same answer.

7 MS. PHARES: Objection, Your Honor.

8 THE COURT: What's the objection?

9 MS. PHARES: We're talking about the period of
10 these contracts as 1985. DVD weren't in existence in
11 1985.

12 MR. MONAGHAN: That's precisely the point
13 he's here to testify about.

14 THE COURT: Well, we're talking, as I said --

15 MS. PHARES: We're talking about the terms of
16 the contract.

17 THE COURT: -- yesterday, that I would take
18 testimony of his opinion as to the terms that are in
19 this agreement.

20 In this agreement, it's your opinion that
21 they were looking forward to DVD?

22 THE WITNESS: It is my opinion that the -- by
23 1985, the standard definition of phonograph record, as
24 commonly used, included all audio or audiovisual
25 devices for home use now known or hereafter devised.

1 So, yes, it did include DVD, in my opinion,
2 in '85, even though there were no DVD in '85.

3 THE COURT: All right. Go ahead.

4 MR. MONAGHAN: Okay.

5 Q. Now, are you familiar with --

6 THE WITNESS: Excuse me. That is not a
7 complete answer, Your Honor.

8 THE COURT: All right. Go ahead. What's the
9 complete answer?

10 THE WITNESS: The DVD, whether known in '85
11 or not, when it did come into existence, required the
12 licensing of the music.

13 Paragraph 6(avi) contemplates payment to the
14 writer for any other use not specified. Since the DVD
15 required music to be licensed and income to be paid to
16 the publisher for that --

17 THE COURT: So, your opinion is: If some day
18 they invent a hologram that sits in the middle of your
19 living room and sings for you, that there is, even
20 though it isn't spelled out anywhere in here, it is
21 assumed, because the word "phonograph" was in there,
22 that it applies?

23 THE WITNESS: And because 6(avi) includes any
24 other use of music. Any future use of music, anything
25 not covered by "a", by "i", double "ii", triple "iii",

1 etcetera.

2 THE COURT: Isn't that a pretty broad view of
3 two words that say other license, or whatever it says?

4 THE WITNESS: It's totally standard. It's
5 totally --

6 THE COURT: All right. Go ahead, Counselor.
7 I don't want to interrupt you.

8 Go ahead.

9 Q. In terms of accounting and royalty statements, sir,
10 are there any customary practices of which you're
11 aware of in the music publishing business, music
12 business in general?

13 A. Well, generally, a royalty statement by a publisher
14 to --

15 MS. PHARES: Wait a minute. Excuse me.

16 Is there any focus of this question? Any
17 general practice regarding royalty statements? I
18 don't even understand the question.

19 MR. MONAGHAN: Yeah. The question is: Are
20 there general practices in terms of when we're dealing
21 with income that's supposed to be received by the
22 writer, is there any general practice about how the
23 writer gets information about what the writers --

24 THE COURT: Well, wait a minute.

25 Aren't we all in agreement that whatever is

1 in this agreement is what binds the writer, and this
2 witness is being called upon to give his opinion about
3 what this means?

4 MR. MONAGHAN: No, no, not at this -- at this
5 point in the question, I'm laying a foundation for his
6 knowledge and experience with how this thing works.

7 How does the system work?

8 MS. PHARES: Your Honor --

9 MR. MONAGHAN: How does the system of
10 reporting and accounting for royalties that are due,
11 how does that work?

12 THE COURT: All right. I will allow some
13 questioning. Go ahead.

14 MS. PHARES: I will just say for the record
15 that I adopt Your Honor's objection. I think we
16 are -- our concern with royalties has to do with what
17 was agreed to between the parties, not what the
18 general practice is.

19 THE COURT: Well, I have a general idea --
20 excuse me -- we're just getting some very quick
21 background. So, let's get to the quick background.

22 Go ahead.

23 A. Generally, a royalty statement will be issued either
24 quarterly or semi-annually, as the general rule, and
25 will include an accounting or income from all of the

1 various licenses that had been issued during that
2 accounting period, a listing of mechanical licenses
3 and the income therefrom, synchronization licenses and
4 the income therefrom, print licenses and the income
5 therefrom. Essentially, that's it.

6 Q. Okay. And is there some frequency that these reports
7 are rendered?

8 MS. PHARES: Asked and answered.

9 THE COURT: No, I'll allow it.

10 Go ahead.

11 A. Generally semi-annually and sometimes quarterly.

12 Q. Okay. Now, have you seen any reporting or royalty
13 statements in connection with this case?

14 A. Yes.

15 Q. Okay. And how many such statements have you seen?

16 A. Well, a statement rendered to the Plaintiff?

17 Q. Right.

18 A. I saw one, I believe, one or two.

19 Q. And did they describe the types of licenses that were
20 involved?

21 A. No.

22 Q. Did they say anything about mechanical licenses?

23 A. No.

24 Q. Synchronization licenses?

25 A. No.

1 Q. Now, what is the --

2 MS. PHARES: Clarification? Could -- could
3 we understand a little bit better the one or two?
4 What does that refer to? What is it that the witness
5 saw?

6 MR. MONAGHAN: Oh.

7 Q. Were you shown, Mr. Berman, a document dealing with
8 some December 1, 2006, communication? And I'm showing
9 you now a document purporting to be a Sony ATV royalty
10 statement with the name TV Loonland on it.

11 Did you see this (handing)?

12 MS. PHARES: Your Honor, I mean, is the
13 document in evidence?

14 MR. MONAGHAN: Well, I think it's your
15 Exhibit 48.

16 MS. PHARES: Well, if it has a number on it,
17 it's your exhibit.

18 THE COURT: All right. Hold on. There was
19 one of them that didn't go into evidence. 48 is in
20 evidence --

21 MR. MONAGHAN: Yeah.

22 THE COURT: -- according to my record.

23 But ask the witness, did you see it.

24 Q. Did you see this? Yeah.

25 A. I did see this, but this is not what I was referring

1 to.

2 Q. Okay. And now I'm showing you AA for identification.

3 A. I also saw this, but this is not what I'm referring
4 to.

5 Q. Okay. And perhaps you can help me out. I don't
6 remember what you're referring to either.

7 A. It was a -- purported to be a statement from Sunbow
8 that had various time periods --

9 Q. Oh, I see. I recall.

10 A. -- with merely a gross amount of money and no
11 indication, no back-up or information of the source of
12 any of the income.

13 Q. You're talking about this page from Exhibit 48 in
14 evidence (handing)?

15 A. That's exactly what I'm talking about.

16 MR. MONAGHAN: Okay.

17 MS. PHARES: Well, Your Honor, are you
18 marking this so that we know what we're talking about?

19 MR. MONAGHAN: That's it.

20 MS. PHARES: Yes, I see it. So --

21 THE COURT: I think counsel just said it was
22 part of 48 in evidence.

23 MR. MONAGHAN: Right.

24 THE COURT: Let's not remark things.

25 MR. MONAGHAN: Counselor did say that. Now

1 Counsel --

2 MS. PHARES: But is it there?

3 MR. MONAGHAN: I don't see it there.

4 THE COURT: All right. Then you may mark it.

5 MR. MONAGHAN: Let's just mark it separately.

6

7 (PLAINTIFF'S EXHIBIT NO. 50 - SONY ATV

8 ROYALTY STATEMENT, 12/1/06, SINGLE PAGE

9 - MARKED FOR IDENTIFICATION.)

10

11 THE COURT: Is there any objection to it
12 going into evidence?

13 MS. PHARES: No objection, Your Honor.

14

15 (PLAINTIFF'S EXHIBIT NO. 50 - SONY ATV

16 ROYALTY STATEMENT, 12/1/06, SINGLE PAGE

17 - RECEIVED IN EVIDENCE.)

18

19 MR. MONAGHAN: Your Honor, would this be a
20 time to take a morning break. I don't have too much
21 more.

22 THE COURT: Let me tell you, we're on a very
23 strict schedule today. That I now have 20 minutes
24 after 10:00. I want you all back in your seats at
25 10:30.

1 MR. MONAGHAN: Yes, sir.

2 THE COURT: All right.

3

4 (Recess taken at 10:20 AM.)

5

6 (Court reconvened at approximately 10:30 AM.)

7

8 CROSS-EXAMINATION BY MS. SAFFER:

9 Q. Good Morning, Mr. Berman. My name is Judith Saffer.
10 I'm the Assistant General Counsel at BMI.

11 A. Good Morning.

12 Q. As you're aware, BMI is one of the Defendants in this
13 lawsuit.

14 You testified a few minutes ago about various
15 matters which impact BMI, and I'd like to ask you
16 about them.

17 Isn't it correct that during your Direct
18 Testimony, you indicated that registrations to BMI,
19 which are sent in by publishers, are submitted with a
20 copy of the sheet music?

21 A. I believe I did.

22 Q. Would you be surprised to learn that, in fact, that is
23 not the practice?

24 A. No, because in thinking about it, I know that was
25 incorrect.

1 Q. You also testified that cue sheets are normally filed
2 with BMI by the publishers, didn't you?

3 A. Or the production -- the television production entity.

4 Q. In your experience, would you say that it was more
5 usual for publishers or production companies to file
6 cue sheets?

7 A. Probably production companies.

8 Q. In your role as counsel to record companies and
9 publishing companies, were you involved in the
10 preparation of cue sheets?

11 A. In the preparation, no.

12 Q. Did your staff prepare cue sheets?

13 A. In various capacities, yes.

14 Q. Did you ever review any of these cue sheets?

15 A. I have, I have seen cue sheets, so I am generally
16 familiar with them.

17 Q. Would you please explain what you mean by "generally
18 familiar with them"?

19 A. I have seen cue sheets. They're notations of music.

20 Q. Would you surprised to learn that cue sheets do not
21 contain notations of music?

22 A. Yes.

23 Q. Would you be surprised to learn that cue sheets
24 normally list a composition and provide time
25 indications and not the notations of music?

1 A. I know they contain time. I know they contain the
2 timing of the use of the music.

3 Q. In the course of your Direct Testimony a few minutes
4 ago, you said, and I quote, I can't explain how rights
5 are calculated by PROs from the submission of cue
6 sheets. Performing rights organizations.

7 A. Societies.

8 Q. I'm sorry.

9 A. What I should have said is, and what I mean is, that
10 the entire method by which ASCAP or BMI collects and
11 disseminates performance income is extremely complex
12 and it is more complex than I could explain.

13 MS. SAFFER: Your Honor?

14 A. There are formulas for varying uses of the composition
15 that create a public performance right, some of which
16 are specific for the use and some of which are some
17 formula that I don't know.

18 MS. SAFFER: Your Honor, based upon this
19 testimony, I would move to strike the expert witness
20 insofar as his qualification on any accounting or
21 dispute concerning royalty payments made by BMI since
22 he has admitted he doesn't understand the process.

23 THE COURT: Denied.

24 Go ahead.

25 MS. SAFFER: Okay.

1 Q. I'd like to draw your attention to Defendant's Exhibit
2 M, which has been shown to you by your counsel, the
3 contract.

4 MS. PHARES: The Jem Agreement.

5 Q. The Jem Agreement, the contract, some pages of which
6 are contained on this -- some of which are contained
7 on the blowups.

8 MS. SAFFER: Is it up here from before?

9 MR. MONAGHAN: There is my copy.

10 MS. PHARES: It's there someplace.

11 Q. I'd like to refer you back to Paragraph 5, which Mr.
12 Monaghan pointed out to you earlier.

13 Doesn't that paragraph specifically say that
14 the Company, which is Sunbow, has the exclusive right
15 to change, add, or subtract from the music?

16 A. I believe it does.

17 Q. Doesn't that paragraph also contain the language that
18 the Company has the exclusive right to combine
19 Plaintiff's music with lyrics?

20 A. I believe it does.

21 Q. Wouldn't that language mean to you that the Company,
22 Sunbow, has the right to add music, which might be
23 creating a new work or a derivative work?

24 A. Adding music -- adding music might create a derivative
25 work. Adding just a different arrangement, in my

1 opinion, would not be a derivative work.

2 Q. What about the addition of lyrics?

3 A. Yes.

4 Q. Yes, that would be creating a new work or a derivative
5 work?

6 A. Take your pick.

7 Q. Would you not agree that creation of a new work or a
8 derivative work, whichever word you want to use, would
9 require the submission of a new cue sheet in order to
10 indicate the participation of the additional writers?

11 A. Yes.

12 Q. I'd like to refer you to Paragraph 5 again. Later on
13 in that paragraph doesn't that say that Sunbow has the
14 right to extend the writer's share of royalties to all
15 others who have participated in the making of this new
16 work or derivative work?

17 A. I'm not exactly sure of the language specifically
18 referred to.

19 Q. 5C.

20 A. Yes; but I believe it's in the context of adding
21 lyrics. I could be wrong.

22 Q. The words are "writer and all other such lyricists."

23 A. Right. The adding of lyrics, yes, I agree.

24 MS. SAFFER: Okay. I have no further
25 questions.

1 THE COURT: All right. Ms. Phares.

2 CROSS-EXAMINATION BY MS. PHARES:

3 Q. Mr. Berman, you said that there were, in fact, two
4 exclusions indicated in this contract; is that
5 correct?

6 A. Yes.

7 Q. And you describe one of them as a for-TV-broadcast of
8 the show; is that correct?

9 A. Yes.

10 Q. And I want to ask you where this exclusion is; if you
11 would identify it?

12 A. I know that you could probably point it to me easier
13 than I can find it.

14 Q. All right. How about this try: Look at Page 6,
15 beginning on the fourth line.

16 A. Correct.

17 Q. Well, would you read that sentence for me? Beginning
18 with "the term".

19 A. "The term theatrical motion picture rights, as used
20 herein, refers to synchronization rights granted with
21 respect to motion pictures intended primarily and
22 initially for theatrical release by direct projection
23 before a paid audience."

24 Q. Paid admission audiences; correct?

25 A. Paid admission audiences.

1 Q. Semi-colon. Keep reading.

2 A. Want me to continue?

3 Q. Yes, please.

4 A. "In no event shall such term refer to motion pictures
5 or other methods of recordation, whether now known or
6 hereafter devised, which are produced primarily and
7 initially for television broadcasting by any means
8 whatsoever."

9 Q. So, in fact, it's not just the TV broadcast of the
10 show that's excluded here, it's any kind of movie that
11 is made primarily for TV; is that correct?

12 MR. MONAGHAN: What's the -- I'm sorry. I
13 have to object to the form. What's the "it" in that
14 question? "It's not just" ... I don't ...

15 Q. All right. This is a -- this is a definition that --
16 that goes with provision 6a; is that correct?

17 A. Are you saying that this refers only to 6a and not
18 to --

19 Q. Well, this says that there is a sync right, does it
20 not, for licenses of theatrical motion picture
21 synchronization as defined below. Correct?

22 A. Yes.

23 Q. And "below" is a reference to this definition, is it
24 not?

25 A. Of sync, yes.

1 Q. All right. So, we're talking now about licenses to
2 third parties to synchronize music written under this
3 agreement; is that correct?

4 A. Yes.

5 Q. In theatrical motion pictures. And that's defined to
6 mean only a theatrical motion picture that is
7 exhibited to a paid admission audience; correct?

8 A. So far.

9 Q. And, therefore, it does not apply to any audiovisual
10 work made for TV?

11 A. No. Well, that -- that -- so far you might be
12 correct.

13 Q. Well, how wouldn't I be correct?

14 A. Because the -- maybe more relevant portion is 6(avi)
15 which covers any other use. And in order to release a
16 home audiovideo device of the TV show, a license is
17 required, and that comes under "avi", Other Use.

18 Q. I'm talking about the definition of theatrical motion
19 picture in 6a-1; correct?

20 A. Okay.

21 Q. We're just focusing on that. And a theatrical motion
22 picture is defined to exclude, does it not, any motion
23 picture which is produced primarily and initially for
24 television broadcasting?

25 A. Yes.

1 Q. It does not include any such movie; correct?

2 A. Yes, yes.

3 Q. That's all I want to know.

4 A. Okay.

5 Q. Now, you also testified that your definition of -- of
6 a phono record includes DVDs and videocassettes and so
7 forth; correct?

8 A. That's the industry generally-accepted definition.

9 Q. Are you familiar with the definition of a phono-record
10 in the Copyright Act?

11 A. I've seen it. I don't recall it right now.

12 Q. Well, would you -- I'm reading to you from the
13 Copyright Act; that the phonograph -- a -- phonograph
14 records are material objects in which sounds, other
15 than those accompanying a motion picture or other
16 audiovisual work, are fixed by any method now known or
17 later developed and from which the sounds can be
18 perceived, reproduced, or otherwise communicated
19 either directly or with the aid of a machine or
20 device.

21 Does that sound familiar to you?

22 A. Yes.

23 Q. And under that definition, is it not clear -- is it
24 also true that -- that it would not include the sound
25 which is associated with an audiovisual work like a TV

1 show?

2 A. The -- the reference to phonograph records in 6(ai) is
3 in the context of mechanical licenses.

4 Q. Well, it doesn't say mechanical licenses, does it?

5 A. Well, that is -- to anybody knowledgeable about music
6 publishing, that is what is being referred to there.

7 Q. Well, I have -- I have I just want -- I understand
8 that you think that that's being referred to, but is
9 it not also possible that this was very carefully
10 drafted to refer to the new definition in the
11 Copyright Act that was effective in 1978?

12 A. It obviously wasn't very carefully drafted to say that
13 because it doesn't say that.

14 Q. Because ...?

15 A. It could have said phono-records as defined in the
16 Copyright Act of 1978; so, it wasn't clear drafted to
17 say that.

18 Q. It just doesn't -- it just refers to phonograph
19 records, you mean, without the -- without the
20 reference to the Act?

21 A. My recollection is that the Act refers to phono-
22 records, not phonograph records.

23 Q. And is it not also true that the Act includes the
24 reference to phono-records in order to distinguish
25 them from copies which includes audiovisual works?

1 A. I'm not following that. I'm sorry.

2 Q. There are two kinds of forms of copies in the
3 Copyright Act, right, phono-records and copies?

4 A. Okay.

5 Q. And copies includes audiovisual works, including their
6 sounds, and phono-records does not include audiovisual
7 -- the sounds of audiovisual works?

8 A. Phono-records, yes.

9 Q. So, doesn't it seem more likely to you that
10 phono-record is used here because it's referring not
11 to the audiovisual works?

12 A. No, because this doesn't refer to phono-records. It
13 refers to phonograph records. So, it's not tracking
14 the language in the Copyright Act.

15 Q. I see. And what were we calling those things in which
16 music was fixed in 1978?

17 A. A variety of things; among others, phonograph records.

18 Q. And ...?

19 A. And what?

20 Q. And what else?

21 A. Records. Sometimes records used alone.

22 Q. Anything else in that time?

23 A. Master recordings.

24 Q. But for the synchronization of -- I mean for the --
25 for making copies of music alone, what were we calling

1 those things in 1978, and '85 for that matter?

2 A. I don't know.

3 Q. You don't know. All right.

4 A. I don't know what you were calling them.

5 Q. And are you aware that in connection with the
6 negotiation of this Jem contract, that there was a
7 negotiation involving videocassettes, and that video-
8 cassettes were denied by Sunbow?

9 MR. MONAGHAN: Objection. He would not have
10 any knowledge, nor can he be asked about what the
11 negotiations were.

12 MS. PHARES: I asked him --

13 THE COURT: Well, this is Cross-examination.
14 He's being asked if he knows anything about it. He
15 can answer it either way.

16 A. No, I have no information on that.

17 Q. So, you're not aware that -- that Ms. Bryant's lawyer
18 asked for payments for videocassettes and that they
19 were denied?

20 A. I'm not aware of that.

21 Q. And I have another question for you. If you would --
22 since we don't have the front page of this agreement,
23 if you would turn to the front page of this contract,
24 and in Paragraph 1, you'll see that there is a
25 reference to the -- the writing, preparing, and

1 delivering to the Company original musical material,
2 which is here and after referred to as the -- capital
3 M -- Music, for songs to be used in a fully animated
4 children's television show.

5 Do you see that?

6 A. Yes, I do.

7 Q. And do you also see, further along in that sentence,
8 that the fully-animated children's television show
9 consisting of either 5 one-half hours, 15 segments, or
10 a television motion picture presently entitled "Jem",
11 and that is referred to as The Show; correct?

12 A. Correct.

13 Q. And, in your mind, how would you distinguish "Music"
14 and "The Show" as they appear in this contract?

15 A. Music are the musical compositions created pursuant to
16 this contract for the show, and the show is the visual
17 portion of the dialogue, the --

18 Q. So, you think that when it describes the five
19 one-and-a-half hours, 15 segments, or the television
20 motion picture, that that -- that ensemble is the
21 show, but that doesn't you include the music?

22 A. No, I said it includes the music.

23 Q. It includes the music?

24 A. Yes.

25 Q. Okay. So, then, if you turn to Section 6, where the

1 publishing rights are described, and specifically to
2 Section 6a-1, that's a reference to Other Uses of the
3 Music -- Capital M -- isn't that correct?

4 A. Yes.

5 Q. It's not a reference to other uses of the show; isn't
6 that correct?

7 A. To other uses of the Music. It doesn't exclude others
8 uses of music with the show, but it is of the Music,
9 that's correct.

10 Q. But it uses specifically the defined term Music, with
11 a Capital M, does it not?

12 A. Certainly it does, because the writer of the music
13 would have no economic interest in the exploitation of
14 the show absent the music. The rights granted here-
15 under to the writer only pertain to income derived
16 from the music.

17 Q. The composer really wouldn't have any economic
18 interest in the show as a whole; isn't that correct?

19 A. No. In the show, absent the music, would be correct.

20 Q. But you just said that the show -- didn't you just
21 testify that the show included the music, that that
22 was a unitary whole; isn't that correct?

23 A. For certain purposes. But if you are reproducing the
24 show, with the music, pursuant to a license to a third
25 party, you are granting them rights to the music and

1 the other elements that make up the show. You're
2 granting a broad bundle of rights, part of which is
3 the rights to the music.

4 Q. Isn't it true, Mr. Berman, that this entire section,
5 6a, refers only to -- in every single section, it
6 refers to, Capital M, Music?

7 A. I believe it -- yes, it only refers to the music.

8 Q. And under your definition, we would have -- we have a
9 confusion, don't we? We have -- we could use show, by
10 your example. It wouldn't make any difference,
11 because we would always be picking out the music
12 portion of it?

13 A. No, we couldn't -- well, show would certainly create,
14 use of that term, a gross ambiguity as to whether or
15 not the writer was entitled to income derived from
16 elements of the show other than the music, which I'm
17 not maintaining.

18 Q. So, in fact, didn't the contract define them
19 separately so we wouldn't have that confusion, isn't
20 that correct? If we were using the music --

21 A. I don't --

22 Q. If we were using the music alone, we use the word
23 "music"?

24 A. I'm not sure that was intended.

25 Q. But you don't know; isn't that correct?

1 A. I -- I can't specifically say I know.

2 Q. Now, you also said that royalty statements sometimes
3 refer to mechanical licenses; isn't that correct?

4 A. Mechanical income, yes, from the licenses.

5 Q. And, well, are you making distinction between
6 mechanical licenses and mechanical income?

7 A. For what purpose? For the purpose of --

8 Q. I don't know. You just corrected me. I was wondering
9 if you were making a distinction.

10 A. I was referring to what generally is provided for in a
11 royalty statement to a writer, and it would indicate,
12 in general, mechanical royalty income that was derived
13 from any licenses issued during the relevant period.

14 Q. And that would refer to -- and that's because you'd
15 see a reference to mechanicals; is that correct?

16 A. Yes, with generally the catalog number of the record
17 in question for which the license was issued.

18 Q. Now, you're familiar with these kinds of royalty
19 statements in the record business; isn't that correct?

20 A. No, I'm talking about a publishing statement.

21 Q. A publishing statement. And do publishing statements
22 include income from foreign countries?

23 A. Yes.

24 Q. Do foreign countries charge mechanical licenses for
25 things that are different than what are charged for

1 mechanicals in the United States?

2 A. I am sorry?

3 Q. Are mechanical licenses made in foreign countries for
4 uses that are -- that differ from the uses made in the
5 United States?

6 A. There is a custom -- it's a ... Possibly.

7 Q. What do you mean by "possibly"?

8 A. The custom and practice currently for royalties on
9 home audiovisual devices, particularly for television
10 pictures, is that the initial license for the
11 television show is a synchronization license, and it
12 has now become standard that, in addition to the
13 synchronization license, there is a buy-out, not a
14 waiver, but a buy-out of the rights to include the
15 composition in home audiovisual devices. The buy-out
16 can be a lump sum, the buy-out can be a royalty, but
17 it's generally taken care of at the time the music is
18 licensed for the show.

19 I believe it may be true in certain foreign
20 countries where the norm for the licensing of the
21 music in a home audiovisual device is a straight
22 mechanical royalty.

23 Q. You say you "believe". Do you know?

24 A. I think that to be the case.

25 MS. PHARES: Do we have double A in evidence

1 yet?

2 MR. MONAGHAN: That's not in evidence.

3 MS. PHARES: Do we know where it is?

4 MR. MONAGHAN: Sure. Right here. (Handing).

5

6 (Off the record discussion between Ms. Phares
7 and co-counsel.)

8

9 MS. PHARES: Exhibit 48 -- I am completely
10 confused with -- oh, these are duplicates. Okay.
11 Q. Now, did you say you were or were not shown
12 Plaintiff's 48 and Defendant's Exhibit A, which has
13 been offered, apparently, only for identification --
14 but, actually, I would be happy to offer it in
15 evidence, if Your Honor would clear that up now. This
16 was offered --

17 MR. MONAGHAN: I know she'd be happy, but we
18 have a serious objection. There's no foundation for
19 this exhibit at all. The only witness who has
20 testified about it is the Plaintiff, who said she
21 never got it. The only way you can get it in is with
22 a person to say it was either sent or received.

23 MS. PHARES: So, there is, actually, Your
24 Honor, attached, as Exhibit B to the affidavit that
25 was admitted yesterday, a letter from me to Mr.

1 Monaghan in 2004, transmitting this document.

2 I don't have it with me, but I can bring it
3 on Friday, a document in which Mr. Monaghan is
4 complaining about having received it.

5 THE COURT: Okay.

6 MS. PHARES: So, if that's --

7 THE COURT: Hold on. The question yesterday
8 of the witness was had she ever seen it, and the
9 answer was no.

10 Now, Mr. Monaghan and you may send anything
11 back and forth to each other, but it doesn't make it
12 evidence.

13 MS. PHARES: Well, the issue -- I understand
14 that. The issue related, however, to whether or not
15 they had been provided to -- to Ms. Bryant. She said
16 she couldn't recall.

17 MR. MONAGHAN: No, she said "no".

18 THE COURT: So, what you're saying -- hold
19 on. What you're saying is, by sending a copy of it to
20 her lawyer, she's, in fact -- in fact provided with
21 it?

22 MS. PHARES: I think that's a fair
23 assumption.

24 THE COURT: Well, I'll consider that. But
25 not now.

1 Go ahead.

2 MS. PHARES: It was produced in discovery in
3 this case.

4 MR. MONAGHAN: But that's not -- that's not
5 the issue. The issue --

6 MS. PHARES: It was also sent to --

7 MR. MONAGHAN: The issue is was a royalty
8 accounting rendered pursuant who whatever the contract
9 requires?

10 MS. PHARES: Well, she also said she
11 certainly remembered receiving the receipt -- the
12 checks that went with it.

13 MR. MONAGHAN: I make my arguments to the
14 Court.

15 THE COURT: All right. Please, let's go
16 forward with this.

17 Q. All right. In any event, have you been shown what is
18 in evidence as Defendant's Exhibit double A?

19 MR. MONAGHAN: It's not in evidence.

20 Q. I mean -- I beg your pardon. It has been identified
21 as Defendant's Exhibit double A (handing).

22 A. I think I saw this:

23 Q. And you're testifying that you don't have any
24 indication of what the uses are when you read this; is
25 that correct?

1 A. No, I didn't say that.

2 Q. Oh, I thought you had said earlier that there were no
3 indications on what you had seen for -- of the uses of
4 the -- of the material. Is that incorrect?

5 THE COURT: I think that's 50 he was talking
6 about.

7 MR. MONAGHAN: That's correct, Your Honor.
8 Objection.

9 Q. I see. But on these royalty statements, Mr. Berman,
10 are the uses indicated on the royalty statements?

11 A. Yes.

12 Q. And what else is indicated on the royalty statements?
13 And tell me what you're looking at, just so we're
14 clear for the record.

15 A. Well, I'm looking at Exhibit AA.

16 Q. Okay. Just use the top page, maybe, as an example or
17 choose a page and give us the production number so
18 we're clear?

19 THE COURT: Well, you're asking him to read
20 something that's not in evidence, Counselor.

21 Q. Are you familiar with these kinds of royalty
22 statements?

23 A. Not this one specifically.

24 Q. I said: Are you familiar with these kinds of royalty
25 statements?

1 MR. MONAGHAN: Well, what does that mean?

2 Object to the form. There's no -- "kind" means

3 there's some standard, some form typical --

4 THE COURT: No, I think that's an answerable
5 question.

6 Have you seen statements like that before?

7 THE WITNESS: Not exactly like this.

8 Somewhat like this.

9 THE COURT: Well, somewhat like this.

10 And in those statements, did they identify
11 the source, purported source, of the money that was
12 being paid to the artist?

13 THE WITNESS: To some extent, yes.

14 THE COURT: Okay.

15 MS. PHARES: Your Honor, I offer this exhibit
16 in evidence.

17 MR. MONAGHAN: Object, Your Honor, on the
18 grounds that have already been discussed.

19 THE COURT: Yes; sustained.

20 Q. So, all right. Would you turn to the other exhibit,
21 Number 40?

22 Have you ever seen a royalty statements like
23 that?

24 A. Somewhat, yes.

25 Q. And do those statements indicate the origin of the

1 monies that are being paid?

2 A. I'm just looking at the first page now.

3 Q. Would you give me the production number?

4 A. I'm sorry?

5 MR. MONAGHAN: The dates numbered on the
6 bottom.

7 A. 1142.

8 Q. Well, rather than look at that summary page, why don't
9 you look at one of the regular pages that is a royalty
10 statement. Let's say 1143.

11 A. What's the question?

12 Q. Can you describe for me, based on your familiarity
13 with royalty statements, for example, taking the first
14 entry, what is indicated by this statement?

15 A. Yes, to a certain extent I can.

16 Q. Would you do so, please?

17 A. It's a mechanical royalty statement. The initial
18 section is for GI Joe. It gives units, it gives the
19 time period, it gives the amount received. I can't
20 tell -- I mean, it does have -- and it has record or
21 catalog numbers. I can't tell by looking at it,
22 because I don't know what the catalog numbers refer
23 to, whether this is for a CD, a DVD, a video device,
24 or not; I don't know. But it's a mechanical royalty
25 statement and it lists the catalog number of the item

1 in question.

2 Q. And does it indicate who the -- who the other -- or
3 the people who are to be paid for the particular ...

4 A. I believe it does.

5 Q. You believe so or does it?

6 A. Well, it says Douglas/Bryant/Walsh.

7 MR. PHARES: Right.

8 A. I'm making an assumption -- I don't have first-hand
9 knowledge -- I'm making the assumption that those are
10 the writers of these cues for which a mechanical
11 royalty is being paid.

12 Q. And then the next row over is under "units". What do
13 you understand that to mean?

14 A. The number of units sold or for which a royalty was
15 paid.

16 Q. And then for the next period, the -- the row, cap
17 period?

18 A. The time period in which those units were sold.

19 Q. And . The next column, what do you understand that to
20 mean?

21 A. The amount received by --

22 Q. I mean, the column that has above it, Percent,
23 P-E-R-C.

24 A. I read that column to indicate percent received.

25 Q. Okay. And then the next column?

1 A. Amount received.

2 Q. And the next column?

3 A. Your share.

4 Q. And then the next column?

5 A. Amount due.

6 Q. And then the next column?

7 A. It's a total.

8 Q. Okay. That was the easy part.

9 A. No, it's pretty clear.

10 Q. And the rest of these statements indicate the other
11 kinds of royalty income?

12 A. Well, I haven't studied these. If you want me to take
13 the time I will.

14 Q. Is there -- do you see any income for ring tones?

15 A. There may well -- yes, I do, yes.

16 Q. And do you see any ring tones for which Ms. Bryant is
17 the recipient of income?

18 MR. MONAGHAN: Object to the form of the
19 question. If I can explain this objection, Your
20 Honor?

21 THE COURT: No. Overruled. You've got an
22 expert witness on the stand. He can answer the
23 question. If he can't, he's going to tell us.

24 MR. MONAGHAN: This is an entirely different
25 subject matter. This royalty statement is not a

1 royalty statement addressed to Ann Bryant. When they
2 say your share, it's addressed to TV Loonland.

3 THE COURT: Counselor?

4 MR. MONAGHAN: The attempt here has been
5 made --

6 THE COURT: Counselor?

7 MR. MONAGHAN: Okay. Withdrawn.

8 THE COURT: Go ahead.

9 A. I'm sorry. Where --

10 THE COURT: Start -- let's go to a new
11 question.

12 Q. Can you identify an entry here that shows the payment
13 of ring tones to Ms. Bryant?

14 A. Oh, I can't identify anything that shows a payment to
15 Ms. Bryant on any of this. This doesn't indicate any
16 payment to Ms. Bryant. It appears to me to indicate
17 money that would be due Ms. Bryant.

18 Q. And why is it that you wouldn't be able to do that?

19 A. It is a statement from Sony ATV Music Publishing, LLC,
20 to TV Loonland purporting, in my estimation, to set
21 forth the various royalties that TV Loonland would be
22 obligated to pay various writers.

23 Q. Okay. And now turn back to Page 1, the one that we
24 spurned earlier. And --

25 A. My goodness.

- 1 Q. Which is Sunbow 1142 is the production number. Do you
2 see an entry on that page referring to Ms. Bryant?
- 3 A. Referring to Ms. Bryant? Yes.
- 4 Q. And from that you are able to determine payments?
- 5 A. Not to Ms. Bryant.
- 6 Q. All right. What can you determine from them?
- 7 A. Well, I can't determine. I intuit, and I think
8 logically so, that there was a payment of a total of
9 approximately \$60,000.00 paid by Sony ATV Music to TV
10 Loonland.
- 11 Q. That's what you -- right. And for what purpose.
- 12 A. For the exploitation of various musical compositions
13 in various foreign territories.
- 14 Q. Attributable to the people who are listed -- and these
15 monies are attributable to these publishing companies
16 and these composers or lyricists; is that correct?
- 17 A. That would be my understanding.
- 18 Q. And one of them is Ms. Bryant; is that correct?
- 19 A. That would be -- that would be my understanding.
- 20 Q. Thank you. Now, one of the -- all right.
21 Well, before we leave that one, why don't you
22 turn to the next -- to the next page, 1143, and do you
23 see at the top, which we were looking at -- at the top
24 of that page, where it says "in account with"?
- 25 A. Yes.

- 1 Q. And what does it say?
- 2 A. Anne Bryant. Bryant, comma, Anne.
- 3 Q. I beg your pardon?
- 4 A. Bryant, comma, Anne.
- 5 Q. And do you understand, then, this to be a page
- 6 referring to Ms. Bryant?
- 7 A. It refers to Ms. Bryant, yes.
- 8 Q. And this is a breakdown of royalties with respect to
- 9 her?
- 10 A. I believe it is.
- 11 Q. Okay. And what about the next page?
- 12 A. I believe the same.
- 13 Q. And the next?
- 14 A. The same.
- 15 Q. And the next?
- 16 A. The same.
- 17 Q. Okay. And then what's the next page, Mr. Berman?
- 18 A. Again a summary page.
- 19 Q. It's another summary page, isn't it?
- 20 A. Correct.
- 21 Q. And then what about the next page? Does it not also
- 22 have a ledger referring to, In account with Bryant,
- 23 Anne?
- 24 A. Yes, it does.
- 25 Q. So, is there really -- is it really so difficult for

- 1 you to figure out what it is that she has been paid
2 by -- based on looking at these statements?
- 3 A. It's not difficult, it's impossible.
- 4 Q. And why is that?
- 5 A. Because all this does is refer to payments that are
6 due, and presumably paid, but I don't even know that
7 for a fact, payments that are due from Sony ATV Music
8 to TV Loonland.
- 9 Q. Correct. But these particular payments on these
10 particular royalties are referring to those assigned
11 to Anne Bryant, are they not?
- 12 A. I would make the logical assumption that this
13 indicates specific amounts of money that TV Toonland
14 (sic) would owe Ms. Bryant. I have no knowledge
15 whatsoever of whether or not those payments were ever
16 made.
- 17 Q. You certainly -- you certainly -- well ...
- 18 A. I don't even know, have any knowledge, as to whether
19 Sony ATV paid these amounts to TV Loonland. I'm
20 making that assumption.
- 21 Q. You're not aware -- you're saying that Sunbow has sent
22 a check to Ms. Bryant for the summary of the amounts
23 that are shown on these pages?
- 24 A. That's correct.
- 25 Q. But you wouldn't be surprised to learn that they have,

1 would you?

2 A. I wouldn't be surprised, no.

3 Q. And in your earlier testimony you mentioned a number
4 of major stars for whom you have negotiated
5 agreements.

6 Isn't it true that these kinds of publishing
7 agreements are, in fact, the subject of negotiation;
8 isn't that correct?

9 A. As a general statement, that's true.

10 Q. And it's also true that the -- the form of the deal is
11 very likely going to relate to how much clout each
12 side has; isn't that correct?

13 A. That's a generally true statement.

14 Q. And it's probably likely, also, that a major artist or
15 a major composer may end up with a more favorable deal
16 than a -- than a more junior, less well-known artist
17 or composer or lyricist; correct?

18 A. I would agree.

19 Q. So, it's -- that it's quite possible, also, that
20 somebody who ends up with a deal that includes
21 extensive publishing rights may differ from a person
22 who has very little clout and can't demand that from a
23 publisher?

24 A. I don't think you phrased it very well. I do believe
25 I know what you're getting at.

1 Q. Well, why don't you patronize me and tell me what you
2 think.

3 A. I do not want to be patronizing here.

4 There are artists, writers, who have more
5 clout, as you say, more bargaining power than others
6 and would get more favorable terms.

7 Q. And isn't it also true, Mr. Berman, that very often,
8 especially in the field of commissioned music for
9 movies and TV, that major, major, writers do not get
10 any publishing?

11 A. Publishing in the sense, then, because the term is
12 used ambiguously, even by people within the industry,
13 publishing in the sense of ownership of copyright,
14 yes. Publishing in the sense of right to what I refer
15 to as, quote, songwriters royalties, definitely, no.

16 Q. And your definition of songwriter royalties are those
17 that are described in this agreement?

18 A. In general, yes.

19 Q. And you think it was common in the mid '80s for a
20 songwriter to have a provision that allowed for other
21 uses of music?

22 A. I'm not -- I'm not following.

23 Q. Isn't it true that for a songwriter to have obtained a
24 provision like Section 6a in an agreement, for
25 commissioned music for a TV show or movies, was highly

1 unusual?

2 A. No, I would say that is part of the standard song-
3 writers royalties provision; 50% of all other income.
4 The normal split between -- of income between the
5 publisher and the writer, because for me the writer
6 has no interest in the copyright, is -- and excluding
7 print -- is roughly 50/50.

8 Q. Well, print is a big part of these -- of these rights
9 here. I mean, print doesn't go on a 50/50 basis.

10 A. Print does not go on a 50/50 basis and print is
11 generally the least lucrative of any of the rights or
12 income producing properties of a composition.

13 Q. Do you happen to know whether or not any of Ms.
14 Bryant's compositions for Sunbow have been licensed
15 for a theatrical motion picture.

16 A. I believe I was informed -- I don't know it from
17 first-hand knowledge. I believe I've been advised
18 that that is the case.

19 Q. By somebody other than someone in this case?

20 A. By Mr. Monaghan.

21 Q. Okay. Not by anybody in this case.

22 Do you know whether or not any of Ms.
23 Bryant's music has ever been -- whether a phono-record
24 has ever been made of any of her songs?

25 A. I don't know.

1 Q. Do you know whether or not --

2 A. Excuse me. By phono-record, you -- in the context of
3 that question, you're excluding audiovisual devices?

4 Q. Correct.

5 A. I don't know.

6 Q. And a synchronization right, let's make it clear, a
7 synchronization right in this agreement only refers to
8 a license made to a third party; isn't that correct?

9 A. I would have to really study it to see that. I think
10 that's probably the case.

11 Q. Well, when it says received by the Company from third
12 parties for licensing, doesn't that mean to you that
13 it would have to be from a third party?

14 A. Well, that includes the mechanical license also.

15 Q. Correct.

16 A. I think it pretty much all refers to third parties; I
17 agree.

18 Q. It all refers to third parties.

19 None of these refer to exploitations by
20 Sunbow itself; correct?

21 A. I have never addressed that issue. I think that's
22 quite possibly true.

23 Q. Mr. Berman, let's go back to the Page 1 where we
24 indicate that the definition of music for this -- for
25 this contract refers to -- well, let me go back.

1 Let's see. That -- I don't want to take this out of
2 context -- but that this is -- music, for purposes of
3 this definition, is original musical material for
4 songs to be used in a fully-animated children's
5 television show that are being delivered pursuant to
6 this agreement.

7 Is that correct?

8 A. That's my understanding.

9 Q. So, am I correct that -- or would you agree, then,
10 that the Sunbow contracts for this contract applies
11 only to the compositions written for Sunbow and not
12 for compositions written for other entities?

13 MR. MONAGHAN: That's -- objection; because
14 the contract speaks for itself and this witness is not
15 privy to the rulings about the other compositions.

16 MS. PHARES: If so we wouldn't have this
17 witness.

18 THE COURT: Hold on. He's an expert witness.
19 If he can answer it. Now, you know, there are things
20 that you can't answer because you don't know all the
21 parts, in which case you say, I can't answer it that
22 way, or ...

23 THE WITNESS:

24 A. I really don't know. I ... I ... It's beyond my
25 purview.

1 THE COURT: Okay. Let's move along with this
2 witness.

3 Q. Wait a minute. You're saying to me that you would
4 understand that -- that the music written under this
5 agreement could be governed by some agreement other
6 than this agreement?

7 A. Well, certainly there could be other agreements which
8 would modify or amend it, so, that is possibly true.
9 It's also possibly true that this agreement is being
10 used, however so, to interpret other agreements, not
11 this agreement. I don't have knowledge of that; I
12 don't know.

13 Q. I just want to tell you that there is a merger clause
14 in this contract and it makes no reference to any
15 other agreements.

16 A. That doesn't mean there can't be a subsequent
17 amendment to it.

18 Q. Well, there is actually a subsequent amendment, that's
19 true, but Mr. Monaghan hasn't deemed it important to
20 show that to you.

21 MR. MONAGHAN: Not fair, Judge. Object to
22 the form.

23 THE COURT: Well, I'm not paying any
24 attention to remarks of counsel. Let's keep going
25 here. I want to move along with this witness.

1 Let's go on.

2 MS. PHARES: I have no further questions,
3 Your Honor.

4 THE COURT: All right.

5 Mr. Monaghan, have you got Redirect?

6 REDIRECT EXAMINATION BY MR. MONAGHAN:

7 Q. Is there any doubt in your mind, Mr. Berman, but that
8 any licenses issued by Sunbow to third parties, such
9 as Kid Rhino Productions, would have come within the
10 purview of the agreement that you've been testifying
11 about?

12 A. None.

13 Q. Is there any doubt but that there should have been
14 reporting about any such licenses?

15 A. None.

16 Q. Have you seen any reporting about licenses to, for
17 example, Kid Rhino or any of these other entities?

18 A. No.

19 MR. MONAGHAN: Thank you, Sir.

20 THE COURT: Ms. Saffer?

21 MS. SAFFER: No further questions.

22 THE COURT: All right.

23 THE COURT: Ms. Phares?

24 MS. PHARES: Just one moment, Your Honor.

25

1 (Off the record discussion between
2 Ms. Phares and co-counsel.)
3

4 THE COURT: You're limited, of course, by the
5 Redirect.

6 MS. PHARES: I have nothing more, Your Honor.

7 MR. MONAGHAN: Thank you, Judge.

8 THE COURT: Mr. Berman, you're not finished
9 yet. I have a couple questions for you.

10 THE WITNESS: Yes, Your Honor.

11 THE COURT: First of all, you know, you have
12 pointed out that the system for dividing up the rights
13 or -- or, even better, put the money is a very
14 complicated one. You said that, so, just --

15 THE WITNESS: Oh, excuse me. I'm glad you
16 asked that, because I was narrowly referring to the
17 methodology used by BMI and ASCAP --

18 THE COURT: Yeah.

19 THE WITNESS: -- which I doubt that many
20 people, including those working for BMI and ASCAP,
21 could explain to you the methodology of how
22 performance income is divided up.

23 THE COURT: Okay. Now imagine, now, you,
24 with a very reasonable background in this field, are
25 having trouble with this. Now imagine a layman, such

1 as myself, trying to figure this out. And that leads
2 me up to the following question: Would it be any
3 surprise to you that the Plaintiff in this case, Anne
4 Bryant, would only get eight percent or
5 eight-and-a-half percent for transformers?

6 THE WITNESS: Yes, it's surprising to me.

7 THE COURT: So, you think that through all
8 the iterations that have gone on with this, that she
9 still should be getting a much larger share of the
10 transformer bucks that are coming in?

11 THE WITNESS: Yes, I do.

12 THE COURT: All right.

13 Yes?

14 MS. SAFFER: If I may, I'd like to ask him a
15 specific question relating to yours.

16 THE COURT: Well, hold on, hold on. If my
17 few questions give rise to something else that you
18 want to ask, you obviously will be permitted to ask
19 that.

20 MS. SAFFER: Thank you, Your Honor.

21 THE COURT: All right.

22 Is there any doubt in your mind that Ms.
23 Bryant was a -- was involved as -- I'm trying to
24 figure the right word, but an artist-for-hire; this
25 was a contract, right?

1 THE WITNESS: That's correct.

2 THE COURT: All right. And under that
3 contract, she had rights to receive a statement, I
4 take it, every six months?

5 THE WITNESS: That is my opinion, yes.

6 THE COURT: All right. Now, that right, I
7 take it, she didn't have to ask for a statement; they
8 were just supposed to be given to her?

9 THE WITNESS: That's my understanding.

10 THE COURT: Now, if there came a time when
11 for years no statement came in, and transformers is
12 all over, it made it into Tom Clancy's books, as a
13 matter of fact, his kids in London, one of them are
14 listening to the transformers tape, wouldn't you think
15 that a reasonable writer would investigate about why
16 there wasn't any money coming in, when obviously it
17 was doing so well?

18 THE WITNESS: I can't say a writer wouldn't.
19 I can think of a couple of issues where a writer might
20 not.

21 If Ms. Bryant was regularly receiving
22 performance income from BMI, she might have thought,
23 improperly, that that was all the activity that was
24 going on. I don't know how sophisticated Ms. Bryant
25 in terms of royalty accountings.

1 Secondly -- I suppose it not for me to say,
2 Your Honor, but there is a No Waiver Clause in this
3 agreement. So that to the extent that she did -- she
4 should have objected at some point, there is a
5 provision in the agreement that says that -- that no
6 waiver doesn't waive any subsequent actions.

7 THE COURT: Okay. But there is a requirement
8 that within a year you have to do something?

9 THE WITNESS: There's a requirement that you
10 have to object to a statement within a year, but if
11 you never get the statement, I don't know how the year
12 commences.

13 THE COURT: So, you feel it's a reasonable
14 action on the part of a writer -- and I'm asking you
15 this as an expert -- with a product, if I can call it
16 that, that is obviously immensely popular, not to
17 wonder through years why no checks are coming?

18 THE WITNESS: Well, my problem -- my problem
19 with that is that there were checks coming. They
20 certainly weren't of the amount that I think they
21 should have been.

22 THE COURT: All right. Final question.

23 Ms. Bryant is entitled to an accounting, is
24 she not, for the money that she purports to be owed
25 under this agreement?

1 THE WITNESS: Yes, that's my understanding.

2 THE COURT: All right. Now, what must she do
3 under this agreement to get that accounting?

4 THE WITNESS: Well, under this agreement, she
5 shouldn't have to do anything to get that accounting.

6 THE COURT: Well, she at least has to say I'm
7 unhappy.

8 THE WITNESS: Well, the burden of the
9 accounting is on the publisher, on Sunbow. The
10 agreements provide that they're obligated, as is the
11 norm in any such arrangement, that the publisher is
12 obligated to render these periodic accounting
13 statements.

14 THE COURT: All right. That's all the
15 questions I have.

16 If that raises other questions in the mind of
17 any of the attorneys here present, they may now ask
18 them.

19 RE-RE-CROSS EXAMINATION BY MS. SAFFER:

20 Q. I think that there is one point that's universally
21 accepted by everybody in this courtroom, that this
22 product is valuable and that Ms. Bryant participated
23 in the creation of the music. The argument's over how
24 much, to what extent, etcetera.

25 Now, would you agree that there are multiple,

1 multiple versions, many versions of this music that
2 has appeared in TV commercials, jingles, whatever, on
3 all of these things that have been waived around by
4 Mr. Monaghan?

5 A. I don't know that for a fact, but I wouldn't be
6 surprised if that were the case.

7 Q. Okay. And you have testified that when an inversion's
8 created because lyrics are added, I think those were
9 your words, that that would call for the submission to
10 BMI of a new cue sheet?

11 A. An additional lyrics, yes, I would agree with that.

12 Q. Okay. Would you agree that if there's new material
13 added by the copyright owner, which you have conceded
14 is Sunbow, that that is going to reduce Ms. Bryant's
15 participation as new writers with new material are
16 added?

17 A. It depends upon whether it is new material or merely a
18 new arrangement.

19 Q. I didn't say new arrangement. I said new material.

20 A. If you are distinguishing it from a new arrangement, I
21 would agree with you.

22 Q. Okay. Would you be surprised to learn that BMI has
23 cue sheets in which Ms. Bryant is indicated as the
24 only writer of the composition?

25 A. No.

1 Q. Would you be surprised to learn that BMI has received
2 cue sheets in which she is listed as a co-writer?

3 A. I have no first-hand knowledge, but I wouldn't be
4 surprised.

5 Q. Would you be surprised to learn that there has been
6 one cue sheet received by BMI which reduced Ms.
7 Bryant's share to, I think it was, eight-and-a-half
8 percent?

9 A. I just have no knowledge of this.

10 Q. Do you have any knowledge of BMI ever creating cue
11 sheets themselves?

12 A. No, I don't.

13 Q. And you have testified that it is BMI's practice to
14 accept cue sheets that are submitted by publishers and
15 producers, have you not?

16 A. It was my understanding that if BMI or ASCAP received
17 new cue sheets which reduced the share -- well, I'm
18 talking about arrangements. New material, which I
19 agree Sunbow had the right to add, I would have
20 thought it would be Sunbow -- excuse me -- BMI's
21 practice to go to the original writer to confirm that
22 this was the case.

23 Q. Why would you have thought so?

24 A. Because the new material being submitted negatively
25 impacts upon BMI's obligation to pay the original

1 writer.

2 Q. Have you ever, in your many, many, many years of being
3 in the music business, submitted a cue sheet and had
4 BMI come to you and say, wait a minute, this is a new
5 cue sheet for a show and, therefore, we're rejecting
6 your cue sheet?

7 A. No.

8 Q. Has that ever happened to you?

9 A. Not to me, no.

10 MS. SAFFER: Okay. Thank you.

11 No further questions.

12 THE COURT: Ms. Phares?

13 RE-RE-CROSS EXAMINATION BY MR. BERMAN:

14 Q. Mr. Berman, I want to talk about this -- this
15 provision of --

16 MR. MONAGHAN: Your Honor said any questions
17 generated by the questions --

18 MS. PHARES: Yes, I do know.

19 MR. MONAGHAN: -- that Your Honor asked.

20 THE COURT: Right.

21 MS. PHARES: That he asked, and that's
22 exactly what I'm asking about.

23 Q. I'm asking about this audit and notice right of the --
24 of the composer. Specifically where it says that the
25 Contractor -- which under this agreement was Kinder

1 and Bryant -- shall have the right, at the
2 Contractor's sole expense, to inspect the Company's
3 books and records relative to gross receipts derived
4 from the use of the Music hereunder and to make
5 extracts thereof, provided such inspection shall be at
6 the Company's offices during reasonable business hours
7 and upon reasonable notice, and not more frequently
8 than once a year. All royalties, statements, and
9 other accounting rendered by Company shall be binding
10 upon the Contractor -- that's, again, Kinder and
11 Bryant -- and not subject to any objection by -- by
12 the Contractor, unless specific objection in writing
13 stating the basis thereof is given to Company by
14 Contractor by one year from the date rendered.

15 Correct?

16 A. Yes.

17 Q. So, if -- so, that one year doesn't begin to run until
18 those statements are received; isn't that correct?

19 A. That would be my interpretation.

20 Q. So, if they happen to be late, that really -- that one
21 year still runs from the date that they're received;
22 isn't that correct?

23 A. I would interpret that to be the case.

24 Q. I mean, if Sunbow happens to send a statement late, it
25 means that that one year is still going to run from

1 whenever it's received by the -- by the artist, the
2 composer; correct?

3 A. Yes. I don't know if that negates a breach, but in
4 general I agree with that.

5 Q. All right. And then -- and then what is the
6 obligation exactly of the -- of the composer at that
7 point?

8 MR. MONAGHAN: The contract speaks for
9 itself, Judge.

10 THE COURT: No, I'll allow it.

11 A. The obligation is nothing. The right of the
12 contractor is to object within a year of receiving the
13 statement.

14 Q. And, in order to help them do that, they can even
15 demand the right to inspect the books of the company;
16 is that correct?

17 A. That have -- that is a fairly typical audit provision,
18 yes, they have the right to audit the books.

19 Q. And they could do that if they had a problem
20 interpreting or they questioned something on the
21 statement, isn't that correct?

22 A. Yes, they could.

23 Q. And that is -- and if they don't do that, however,
24 then that claim is barred; is that correct?

25 A. Well, you know, that's ... What's interesting about

1 that, in my opinion, poorly drafted clause, is the
2 right to audit, which it normally would be, is not
3 specifically limited to the one year from the date
4 rendered. It does say, shall be binding, not subject
5 to objection. But it doesn't -- within one year of
6 rendering --

7 Q. Wait a minute, wait a minute.

8 A. -- but it doesn't --

9 MR. MONAGHAN: Can he finish his answer,
10 Judge.

11 Q. What is it that -- I know, but it had a lot of -- what
12 is it that you say is binding or not binding?

13 A. The account rendered, the royalty statements and other
14 accounts rendered --

15 MS. PHARES: Okay.

16 A. -- if not objected to within a year from being
17 rendered.

18 Q. Let's take as an example where you were last employed
19 at Buena Vista Music.

20 Did those agreements, say, with the people
21 who wrote music for the -- the animated Disney shows,
22 did they include an accounting provision like this?

23 A. Not, that strenuous, not that onerous, no.

24 Q. And those -- those composers also had publishing
25 rights from that music?

1 A. Again, ambiguous term. My answer to that would be
2 absolutely no, because I distinguish between song-
3 writers royalties and publishing royalties, and in
4 Disney's animated feature films, Disney insists on
5 owning clearly 100% of the copyright.

6 Q. Of the copyright. But --

7 A. And, therefore, 100% of the, quote, publishing or the
8 publisher's share of income.

9 Q. Of the publisher's share. But there were -- but those
10 agreements included publishing royalties to the
11 composers of the music?

12 A. Well, you can refer to it in that way. I think that's
13 a poor way of referring to it. It did include song-
14 writers' royalties to the writers.

15 MR. MONAGHAN: This is way beyond the
16 questions, Judge.

17 MS. PHARES: I'm just -- I was trying to use
18 an example, but I want to make sure we're talking
19 about the same thing.

20 Q. I see. But those agreements included what you're
21 calling songwriter royalties?

22 A. Absolutely.

23 Q. And they would have included -- what would have been
24 less onerous?

25 THE COURT: Well, let's stick to this

1 contract alone.

2 MS. PHARES: All right, Your Honor.

3 THE COURT: I'm having enough trouble with
4 that.

5 MS. PHARES: That's fine.

6 Q. And, then, in your view, this -- if then there had
7 been an audit by the -- by the composer, and they had,
8 in fact, made their objection within one year, then
9 what would happen in the ordinary course of an
10 auditing of that procedure?

11 A. The audit would have been presented. There would have
12 been some kind of dialogue or negotiation. A
13 settlement would have been reached or a lawsuit would
14 have been filed.

15 Q. And it's at that point that if there were no
16 settlement, that a lawsuit would be filed?

17 A. That would be a typical case of what would happen.

18 Q. And that's what would be required under the agreement,
19 too; isn't that correct?

20 A. What, a lawsuit?

21 Q. No, that you would have to pursue this -- this process
22 before you get to the point of deciding that you're
23 going to sue.

24 A. If the statements were rendered, I think that's
25 probably true, if they were rendered, yes.

1 MS. PHARES: Thank you, Your Honor.

2 THE COURT: All right.

3 MS. PHARES: Thank you, Mr. Berman.

4 THE COURT: All right, Mr. Berman, you may
5 step down.

6 THE WITNESS: Thank you.

7

8 (Whereupon the witness, David M. Berman,
9 was excused at approximately 11:45 AM.)

10

11 THE COURT: All right. I have said that
12 we'll meet on Friday.

13 Let me ask Mr. Monaghan, have you had time to
14 put in whatever response you want?

15 MR. MONAGHAN: Not at all. Haven't even
16 looked at it yet, Your Honor. We were with Mr.
17 Berman. We're going to do that today, this afternoon.

18 THE COURT: Well, I, tomorrow, am out all
19 day, as I told you. And, so, my question is: Do you
20 want to put our next meeting off until Monday?

21 MR. MONAGHAN: Yes, that's fine.

22 THE COURT: Ms. Phares?

23 MS. PHARES: Well, Your Honor, is -- is the
24 Plaintiff resting?

25 MR. MONAGHAN: No, of course not.

1 MS. PHARES: Well, what's ...

2 THE COURT: Well, what I'm putting off is the
3 oral argument on your motion.

4 MR. MONAGHAN: Right.

5 MS. PHARES: Yes, I understand that, but
6 that's -- the only thing that -- that I'm asking: Is
7 the Plaintiff resting?

8 MR. MONAGHAN: No, of course not.

9 THE COURT: He said "no".

10 MR. MONAGHAN: We have admissions we're going
11 to get into the record, formal judicial admissions.
12 We have witnesses we've subpoenaed.

13 We're not resting.

14 MS. PHARES: Your Honor, I mean, I can -- if
15 this is the end of that, I can convert that motion to
16 a directed verdict and we can argue that on Friday,
17 but I don't want --

18 THE COURT: I thought that from what you said
19 the other day orally that that was your motion for a
20 directed verdict?

21 MS. PHARES: I was -- that motion was a
22 motion for -- I made a directed verdict at the end of
23 Ms. -- at the end of Ms. Bryant's testimony --

24 THE COURT: Right.

25 MS. PHARES: -- when she had conceded the

1 merger of her oral agreements. That's what we were on
2 trial for. Then Mr. Monaghan was raising new issues
3 that he thought he was entitled to proceed on. That
4 motion, and the motion we filed yesterday, was
5 explaining that there is no claim for an equitable
6 accounting in this case and cannot be as a matter of
7 law because there is no fiduciary relationship between
8 Ms. Bryant and Sunbow Productions.

9 And, in addition to that, we were also
10 arguing that as a condition precedent to any -- to any
11 contractual accounting, she is required to go through
12 the -- the audit notice provisions that are in her
13 contract. That's the subject of that motion.

14 THE COURT: Yeah. Well, so, it comes down to
15 this: I intend to decide whether or not at this point
16 there is a viable claim for an accounting.

17 Now, I have already decided on the record
18 that there is no problem with the contracts. We've
19 been through that. There are written contracts; there
20 are no oral contracts. They have all been assumed
21 into the final written version. So, as far as I'm
22 concerned, that's not in the case anymore. The only
23 question is: What right, if any, does Ms. Bryant have
24 for an accounting, for an audit, or whatever? And I
25 am prepared to rule on it on Friday or Monday.

1 However, to give Mr. Monaghan a reasonable chance to
2 read your papers --

3 MS. PHARES: I understand, Your Honor, but --

4 THE COURT: -- I put it over until Monday.

5 MS. PHARES: But here's my confusion. If she
6 has no right to an accounting, then I don't understand
7 why we're hearing evidence on an accounting, which, I
8 mean, we only did this with Mr. Berman today because
9 of the representation that he was already en route to
10 the -- to the court.

11 THE COURT: No, I said -- I said several
12 times that if he was allowed to be called, I was
13 interested in his view on, you know, the terms and
14 also on the question of the accounting, and I think
15 we've gone into that.

16 MS. PHARES: But I guess I'm trying to also
17 deal with just the practicality of the time that's
18 available to us, is that if Mr. Monaghan is talking
19 about having many, many more witnesses that he's
20 noticed, but he noticed them on an issue that I think
21 Your Honor has said is behind us, so I'm trying to
22 figure out what's left.

23 THE COURT: Well, I told you what's left.
24 From my standpoint what's left is whether or not Ms.
25 Bryant is entitled, on this action, to go ahead with

1 an accounting of any sort, and I'm willing to decide
2 that on Friday, if that's what the parties all want;
3 or, to give Mr. Monaghan time to answer a motion that
4 I think he justifiably claims he hasn't even read yet
5 because he's been involved in preparing an expert
6 witness, etcetera, so I think fairness would require
7 me to say that, regardless of any objection, that I
8 will see you all on Monday morning at 10:00 o'clock.
9 And, at that time, I'll listen to any oral argument
10 you have and probably decide this from the bench
11 because I will have done whatever I wanted to do over
12 the weekend.

13 MS. SAFFER: Your Honor, I have, I guess one
14 would call it scheduling or housekeeping.

15 THE COURT: I thought you told me you were
16 available on Monday.

17 MS. SAFFER: I am available on Monday.

18 THE COURT: Good.

19 MS. SAFFER: And I will be here on Monday, I
20 promise. I mean, you know, as they say, God willing.

21 THE COURT: All right.

22 MS. SAFFER: But if we are to go forward, I
23 do have some problems later on during the week, as I
24 do with my witness.

25 THE COURT: I'll address those on Monday.

1 MS. SAFFER: Okay, okay.

2 MS. PHARES: But, Your Honor, I understand
3 and I appreciate your wanting to make time for us to
4 make a directed verdict, but I can't make a directed
5 verdict unless I know whether or not Mr. Monaghan is
6 resting.

7 THE COURT: Let me give you an analogy, even
8 though it will -- Libby said all analogies limp.
9 Well, this one may do worse than that. But let me put
10 you into a standard negligence case. And there gets
11 to be a time when the Plaintiff is on the stand and it
12 turns out that he didn't fall off this roof, he
13 actually fell down the stairs in his own home and he
14 carried himself up and all this. It comes out that
15 way. The Plaintiff hasn't called his doctor yet,
16 etcetera, and the defense gets up, and they move for a
17 directed verdict or a dismissal. The Judge, in that
18 case, could handle it without the Defense -- excuse
19 me -- the Plaintiff ever resting.

20 It's up to me. This case has been a little
21 disjointed, but mostly, I would say, that that falls
22 on the complexity of the matter, the density of the
23 Court in appreciating it all, and also a great many
24 speeches that have been put into this record, and I
25 think everybody's responsible for that.

1 So, I'm pointing out to you that, as far as
2 I'm concerned, you made a motion, dismissal, directed
3 verdict, whatever you want to call it. I'm going to
4 see what's left in this case over the next couple of
5 days, and I'll also read any last minute tidbits you
6 want to send to me, but don't send them after Friday,
7 please, because I have to read this over the next
8 couple of days, and I don't want to be here on Monday
9 morning reading things. All right? So, anything you
10 send to me after Friday afternoon will not be read.

11 MS. PHARES: But we're arguing the motion
12 that I made earlier on Monday morning, are we not?

13 THE COURT: On your motion, which you made at
14 that time for a directed verdict, and which I pointed
15 out that the Plaintiff doesn't have to rest as far as
16 I'm concerned.

17 MS. PHARES: You know what? I think maybe
18 there's confusion. I did make a motion for a directed
19 verdict at the time of Ms. Bryant's testimony. Then,
20 if you'll recall, Your Honor, yesterday we had papers
21 on the motion to dismiss these new claims that Mr.
22 Monaghan then advanced on Monday afternoon, and I
23 thought that's what we were going to argue on Monday
24 morning.

25 But are you saying that we're going to argue

1 both of those motions?

2 THE COURT: As far as I'm concerned, on
3 Monday morning, I am prepared to tell you where this
4 case stands and what, if anything, is left in this
5 case and -- but, first, obviously, I'm going to allow
6 each of you to make a record, a short record of your
7 points. I'm sure Mr. Monaghan is going to say, how
8 can you do this when you haven't heard the entire
9 Plaintiff's case? A very good argument. I pointed
10 out how that can happen in other types of cases, and
11 it could happen here.

12 Now, if I haven't thoroughly confused you,
13 which was not my intention, at least in my own mind I
14 know what's going on and I will see you -- don't
15 laugh; I'm not kidding. And I will see you on Monday
16 morning at 10:00 o'clock.

17 MS. PHARES: It's not Friday. Monday
18 morning?

19 THE COURT: Yes.

20 MS. PHARES: Okay.

21 THE COURT: I've decided that Mr. Monaghan
22 deserves a chance to put in any papers he wants.

23 And, remember, Friday don't send me any
24 papers after Friday.

25 MS. PHARES: So, but now yesterday -- so,

1 this is a revision of the briefing schedule we
2 discussed yesterday?

3 THE COURT: Yes.

4 MS. PHARES: Okay. So, Mr. Monaghan is going
5 to -- we're going to, what, simultaneously brief? We
6 don't get to see what Mr. Monaghan's saying at all in
7 response to ours?

8 THE COURT: Well, you have made a very
9 extensive oral argument on the record about this, and
10 the -- which I have had a copy of; so, I know what you
11 said. Mr. Monaghan and you made a written motion.
12 Mr. Monaghan deserves to be able to answer that.

13 MS. PHARES: And we were going to reply to it
14 by the following --

15 THE COURT: And you can reply to it by -- as
16 long as it isn't after Friday afternoon.

17 MS. PHARES: Well, unfortunately, Mr.
18 Monaghan only serves at 5:05 on Fridays, so that will
19 be difficult for us to respond to.

20 MR. MONAGHAN: How about we'll serve the
21 papers by 12:00 or -- 1:00 o'clock on Friday?

22 THE COURT: Personally, I don't know what
23 more there is to say in this case.

24 MS. PHARES: Well, the problem is that we say
25 it and then it changes, and then we have to have an

1 opportunity to respond.

2 THE COURT: Well, Ms. Phares, I have done my
3 best to whittle the issues in this case down, and we
4 are where we're at, and I'm going to see what is left,
5 and I will see you on Monday morning at 10:00 o'clock.
6 No brief from anybody will be accepted after 5:00
7 o'clock on Friday -- let me make it 4:30 because I'm
8 going to leave at 5:00 o'clock.

9 This has been a very hard-fought case, which
10 may or may not be over. Some very, very good points
11 have been made; and, in all honesty, Mr. Berman, I'm
12 glad we had you as a witness.

13 MR. BERMAN: Thank you.

14 THE COURT: Doesn't mean I understand it any
15 better, but I've tried.

16 MR. MONAGHAN: One very brief, very quick --

17 THE COURT: Go ahead.

18 MR. MONAGHAN: On our Plaintiff's case we
19 still have admissions to get in the record. I don't
20 want to burden the Court with it now, but -- but on
21 Monday --

22 THE COURT: If there are admissions, I tell
23 you, submit them.

24 MR. MONAGHAN: I will.

25 THE COURT: If they're admissions, they're

1 admissions.

2 MS. PHARES: If you have them, why don't we
3 just do them now? We're here.

4 THE COURT: All right.

5 MR. MONAGHAN: Okay.

6 THE COURT: My recollection is that there
7 weren't that many.

8 All right. We'll take a ten-minute break.
9 Then we'll have the admissions.

10 MR. MONAGHAN: Thank you, Judge.

11

12 (Whereupon a recess was taken at approximately
13 11:55 AM.)

14

15 (Court reconvened at approximately 12:10 PM.)

16

17 THE COURT: All right, Mr. Monaghan.

18 MR. MONAGHAN: I will make this very short.

19 We are asking the Court to take formal
20 judicial notice of the following admission made by
21 Sunbow in its Memorandum of Law in support of its
22 motion to dismiss, dated May 7, 2004. That's one of
23 the many Sunbow motions you've dealt with.

24 In that motion, Sunbow made the following
25 statement, on Page 19. On appeal this was referenced

1 A802. Sunbow said, and I'm reading from Paragraph 4:
2 "Under the standard Sunbow work-for-hire agreements,
3 Plaintiff still has publishing rights. Plaintiff
4 appears to be confused about the publishing royalties
5 available to her under the Sunbow agreements. She
6 cites Sunbow as stating she has no rights to
7 mechanical or synchronization royalties."

8 Plaintiff's brief at 31-33, Bryant affidavit,
9 Blue paragraphs 15, 17, and 19. "Sunbow does not say
10 this. While this misunderstanding does not impact the
11 Court's analysis of the sufficiency of Plaintiff's
12 evidence for purposes of summary judgment, we think it
13 would be helpful to point out that Sunbow is not
14 interpreting Plaintiff's rights under the Sunbow
15 contracts as narrowly as she claims they are. Under
16 the Sunbow agreements, and the Kohn, K-O-H-N, Form
17 3.8, Phares Exhibit G to J", parens, "Sunbow is
18 obliged to pay Plaintiff a royalty of 50% of the net
19 profits from licenses to third parties of mechanical
20 or synchronization rights, assuming they are not
21 barred by the Statute of Limitations", parens, "see
22 Section 2C, Intro., CEG, Phares Exhibit H-k, Paragraph
23 6a-1."

24 And here's the rub. "But Sunbow does not
25 agree that the licenses made for the distribution of

1 the TV shows and videocassettes and DVDs is an
2 exercise of either one of those rights", closed paren.

3 So, that's why we're here, that's the
4 admission, and that -- you've heard the expert
5 witness.

6 MS. PHARES: Your Honor, that sounds to me
7 like argument.

8 MR. MONAGHAN: No, it was asked as an
9 admission.

10 THE COURT: The Court will take it any way it
11 wants.

12 MS. PHARES: Well, I mean --

13 THE COURT: Let's not have any more argument
14 today on it.

15 MS. PHARES: Okay.

16 THE COURT: Anything else?

17 MR. MONAGHAN: No, Your Honor.

18 THE COURT: Any other admissions?

19 MR. MONAGHAN: No, Your Honor.

20 THE COURT: Okay. I'll see you all at 10:00
21 o'clock on Monday morning. And I've already told you
22 what to do with any other papers you want to submit.

23 MR. MONAGHAN: Thank you, Judge.

24 THE COURT: Have a good day, good afternoon,
25 and a good weekend.

1	I N D E X T O E X H I B I T S	
2		
3	(PLAINTIFF'S EXHIBIT NO. 49 - CURRICULUM	
4	VITAE OF DAVID M. BERMAN - FOR IDENTIFICATION.)	
5	5:18
6		
7	(PLAINTIFF'S EXHIBIT NO. 49 - CURRICULUM	
8	VITAE OF DAVID M. BERMAN - RECEIVED IN	
9	EVIDENCE.).....	6:20
10		
11	(PLAINTIFF'S EXHIBIT NO. 50 - SONY ATV	
12	ROYALTY STATEMENT, 12/1/06, SINGLE PAGE	
13	- MARKED FOR IDENTIFICATION.).....	43:7
14		
15	(PLAINTIFF'S EXHIBIT NO. 50 - SONY ATV	
16	ROYALTY STATEMENT, 12/1/06, SINGLE PAGE	
17	- RECEIVED IN EVIDENCE.).....	43:15
18		
19	(PLAINTIFF'S EXHIBIT NO. 50 - SONY ATV	
20	ROYALTY STATEMENT, 12/1/06, SINGLE PAGE	
21	- RECEIVED IN EVIDENCE.).....	43:15
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